

THE ONTARIO MUNICIPAL FREEDOM OF INFORMATION AND  
PROTECTION OF INDIVIDUAL PRIVACY ACT:  
AN ANALYSIS OF ITS APPLICATION TO SCHOOL BOARDS

by

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## **THESIS ABSTRACT**

In Canada freedom of information must be viewed in the context of governing -- how do you deal with an abundance of information while balancing a diversity of competing interests? How can you ensure people are informed enough to participate in crucial decision-making, yet willing enough to let some administrative matters be dealt with in camera without their involvement in every detail. In an age when taxpayers' coalition groups are on the rise, and the government is encouraging the establishment of Parent Council groups for schools, the issues and challenges presented by access to information and protection of privacy legislation are real ones.

The province of Ontario's decision to extend freedom of information legislation to local governments does not ensure, or equate to, full public disclosure of all facts or necessarily guarantee complete public comprehension of an issue. The mere fact that local governments, like school boards, decide to collect, assemble or record some information and not to collect other information implies that a prior decision was made by "someone" on what was important to record or keep. That in itself means that not all the facts are going to be disclosed, regardless of the presence of legislation. The resulting lack of information can lead to public mistrust and lack of confidence in those who govern. This is completely contrary to the spirit of the legislation which was to provide interested members of the community with facts so that values like political accountability and trust could be ensured and meaningful criticism and input obtained on matters affecting the whole community.

This thesis first reviews the historical reasons for adopting freedom of information legislation, reasons which are rooted in our parliamentary system of government. However, the same reasoning for enacting such legislation cannot be applied *carte blanche* to the municipal level of government in Ontario, or

more specifically to the programs, policies or operations of a school board. The purpose of this thesis is to examine whether the Municipal Freedom of Information and Protection of Privacy Act, 1989 (MFIPPA) was a necessary step to ensure greater openness from school boards. Based on a review of the Orders made by the Office of the Information and Privacy Commissioner/Ontario, it also assesses how successfully freedom of information legislation has been implemented at the municipal level of government. The Orders provide an opportunity to review what problems school boards have encountered, and what guidance the Commissioner has offered. Reference is made to a value framework as an administrative tool in critically analyzing the suitability of MFIPPA to school boards.

The conclusion is drawn that MFIPPA appears to have inhibited rather than facilitated openness in local government. This may be attributed to several factors inclusive of the general uncertainty, confusion and discretion in interpreting various provisions and exemptions in the Act. Some of the uncertainty is due to the fact that an insufficient number of school board staff are familiar with the Act. The complexity of the Act and its legalistic procedures have over-formalized the processes of exchanging information. In addition there appears to be a concern among municipal officials that granting any access to information may be violating personal privacy rights of others. These concerns translate into indecision and extreme caution in responding to inquiries. The result is delay in responding to information requests and lack of uniformity in the responses given.

However, the mandatory review of the legislation does afford an opportunity to address some of these problems and to make this complex Act more suitable for application to school boards. In order for the Act to function more efficiently and effectively legislative changes must be made to MFIPPA. It is important that the recommendations for improving the Act be adopted before the government extends this legislation to any other public entities.

## **LIST OF ABBREVIATIONS**

**MFIPPA** - The Municipal Freedom of Information and Protection of Privacy Act, 1989

**FIPPA** - The Freedom of Information and Protection of Privacy Act, 1987

**IPC** - Office of the Information and Privacy Commissioner/Ontario

**OPSBA** - Ontario Public School Boards' Association

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## **CHAPTER 1**

### **INTRODUCTION**

In Canada, as elsewhere, access to information legislation has resulted largely from the lack of procedures and processes available to citizens who want be better informed about what information is being collected and retained by government. The old cliché that "knowledge is power" is one of the major reasons why this legislation has been adopted at all three levels of Canadian government. Access to the right information is often seen as a means of achieving real power. This thesis argues, however, that the Ontario Municipal Freedom of Information and Protection of Individual Privacy in Municipalities and Local Boards Act (hereinafter referred to as MFIPPA or the Act), in its existing form, is unsuitable for the entities of municipal government, and specifically for school boards. While good intentions, and substantial time and debate paved the way for MFIPPA, the rationale for the legislation governing the federal and Ontario governments does not necessarily apply in full to Ontario's school boards.

Bill 49 (MFIPPA) was passed by the Ontario Legislature on December 14th, 1989 and came into effect on January 1st, 1991. A copy of the Act can be found in Appendix Q. As noted in Chapter 2, both the federal and provincial governments already had analogous legislation extending to their ministries, agencies, boards, commissions and corporations. However, as of January 1st, 1991, the Act also extended freedom of information and protection of privacy principles to more than 25,000 municipal institutions, including municipal corporations, school boards, public utilities commissions, hydro electric commissions, transit commissions, police services boards, conservation authorities, boards of health and other local boards. While the Act applied to all of these entities, this thesis will focus solely on the Act's impact on school boards.

## **(A) THESIS OVERVIEW**

Chapter 1 provides an overview of the thesis by highlighting aspects from each of the other chapters. It also explains the research methodology and the issues addressed in a questionnaire circulated to Ontario school boards to ascertain their experiences with MFIPPA. Finally, the chapter outlines the basic concepts of the values framework which was used to analyze the suitability of this legislation as it relates to school boards.

In support of the hypothesis that Ontario's freedom of information legislation is not suitable for application to school boards, Chapter 2 examines the historical reasons for government secrecy and the underlying reasons for demanding more openness that led to the introduction of the initial federal legislation. While most citizens can support the concept of maintaining secrecy in the interest of national security, uncertainty arises as to whom we should delegate the awesome authority to determine what documents should be classified as top secret. The potential for abuse is real, especially in the form of covering up a politically embarrassing document. The other major reasons for limiting the public's right to know were the traditional oath of official secrecy sworn by public servants, the principle of parliamentary supremacy, the notion of ministerial responsibility and the limited legal challenges offered by the judiciary, coupled with the judicial deference given to executive decisions made by government officials. Over time these traditions have given rise to debate regarding the need for political accountability in a democracy. Access to information is a key ingredient for an informed and educated electorate who want to participate in the decision-making process. The amount of information being assimilated by the emerging use of computer technology, with all its inherent complexities and capabilities, is also a factor that justifies the need for this legislation at certain levels of government, but not necessarily in its current form at the local level.

Chapter 2 also examines the slow progress made by the Canadian and Ontario governments and their various task forces and commissions, in studying the need for, and then introducing, legislation at the federal and provincial levels dealing with freedom of information and protection of privacy. The most important step in this process, for the purposes of this thesis, was the decision to apply the provincial legislation to all municipalities, school boards and agencies without affording any of these institutions an opportunity for input on the practical implications of this decision. The Williams Commission, upon which most of the legislation is based, did not deal with its applicability to local government, primarily because it was not the original intention of the government to extend the legislation this far.

Nonetheless, the existing legislation governing school boards came into effect on January 1, 1991. Chapter 3 contains an overview of the legislation itself, and the various practical steps required from boards of education in order to comply with the Act. In addition the role of the Office of the Information and Privacy Commissioner/Ontario (hereinafter referred to as the Office of the IPC/Ontario or just the IPC) and Management Board is explained.

Aside from taxpayers or school board employees relying on MFIPPA, there was a suspicion that it would be heavily used by the media to obtain information on a vast array of subject matters, and on a host of controversial educational issues from the officials making decisions. Chapter 4 of the thesis shows that the media's usage of MFIPPA has been surprisingly minor. Several possible explanations for the reluctance of the media to utilize the legislation are also explored.

The nature of some real and potential requests have raised numerous questions and issues of concern for students, school administrators and trustees, some of which are outlined in Chapter 5.

The purpose of Chapter 6 is to examine the actual cases presented to the

IPC Office, and the subsequent orders made by it, in order to determine whether or not school boards across Ontario were experiencing a collective uncertainty about the application of this new legislation to some very practical situations affecting school board programs, policies, and personnel. Many issues and questions are raised in this chapter by the review of orders directly involving school boards. Was the Act interfering with the normal exchange of information by introducing an overly-formalized process? Did school board personnel feel they were adequately trained to deal with requests under the Act, and did funding permit the allocation of the necessary staff and resources? Are school boards overly cautious about infringing the Act, which tends to lead to legalism and delay? What dangers exist in applying this legislation to the operation of school boards? While there are many questions, the cases decided so far offer only limited guidance to school boards, and do little to diminish the complexity of the legislation.

Chapter 7 outlines some of the problems arising during the implementation of this legislation over the past three years. Boards of education were not consulted prior to the enactment of MFIPPA. Fortunately, however, a mandatory review period was incorporated in the Act in order to provide for a review of the legislation's effectiveness. A survey of a selected group of school boards across Ontario assisted in formulating a list of concerns, some of which were also identified in the provincial three-year review of the analogous provincial freedom of information legislation. In Chapter 8 a number of recommendations are presented for making the Act more suitable for school boards.

## **(B) RESEARCH METHODOLOGY**

Several research methods were utilized to obtain the background information and data for the preparation of this thesis. An initial computer search on the

topic of access to information revealed an enormous amount of general literature on this subject, but less on the Canadian situation and even less on school boards. There were only a few articles and several government publications, guides and newsletters, which were too basic in nature to be of much more than limited use. The scarcity of specific literature pertaining to school boards could be attributed to the fact that MFIPPA only came into force in 1991. Therefore, in order to understand why the legislation was enacted, a broader search was made to gather information on the historical reasons and political climate that gave rise to the need generally for access to information legislation, initially at the federal and the provincial levels of government, and then later at the municipal level. This involved reading numerous books on the topic, a review of several scholarly articles, a further computer search for other relevant documents, and an examination of newspaper articles to determine how the media had responded to the municipal legislation.

The third research step involved the preparation of a questionnaire that was distributed to a cross-section of school boards located throughout Ontario. The purpose of the questionnaire was to assess how boards of education have responded to the legislation coming into force, and what, if any, obstacles or concerns they had encountered.(1) A copy of the questionnaire can be found in Appendix "A".

### **(C) THE QUESTIONNAIRE**

An issue identified in the questionnaire was how school boards coped with the enactment of this legislation. Did they hire new staff or assign the responsibilities to existing employees? Did the school boards only comply with the basic requirements of the Act or did they create additional mechanisms like procedural manuals or training videos to increase their staff's familiarity and efficiency with

the Act? Each board was asked about what information or training sessions were provided to its staff, and how it would rate its staff's awareness and understanding of the legislation. Since the intention of the legislation was to facilitate obtaining access to information held by local government, each board was asked to report on the number and types of requests it had received, and its experiences with the appeal process. Lastly each board was asked to elaborate on any barriers it had encountered in interpreting or applying the legislation, and to express any administrative concerns about the Act.

#### **(D) VALUE FRAMEWORK**

In order to analyze whether the legislation is suitable for school boards, a value framework for the study of public administration was used. (2) It is argued that certain administrative values held by individuals within an organization are reflected in administrative performance. The most important administrative values are neutrality, accountability, efficiency, effectiveness, responsiveness, representativeness, integrity and fairness. In relation to this thesis the value framework is useful for examining the nature and extent of coordination within and between governments in the formulation and implementation of the freedom of information legislation, and, ultimately, it provides a conceptual framework from which to judge the suitability and effectiveness of the current legislation as it applies to school boards.

The concept of **value neutrality** is based on the assumption that bureaucrats can never be completely value neutral in making and recommending decisions. The opportunity to inject their own views into decisions is always present, and raises the importance of the second concept, that of **administrative accountability**. "Accountability involves concern for the legal, institutional and procedural means by which bureaucrats can be obliged to answer for their

actions." (3) The emphasis on accountability is evident in the public's concern about holding public servants accountable for the efficient and effective use of public funds.

This leads to the third and fourth values, namely those of administrative efficiency and effectiveness. These two values are interdependent but distinct in meaning. In some circumstances they complement one another, but in others they may conflict. **Efficiency** is defined as a measure of performance that may be expressed as a ratio between input and output. (4) In contrast **effectiveness** is a measure of the extent to which an activity achieves the objectives of an organization. (5)

The fifth value is that of **administrative responsiveness**, which refers to the inclination and the capacity of public servants to respond to the needs and demands of both political institutions (the legislators) and the general public, as well as the specific individuals affected by their administrative decisions or recommendations. (6)

The preservation of public trust and confidence in government is dependent on maintaining the sixth value of **integrity**, used here to refer to ethical performance. (7) Adherence by public servants to high ethical standards is an essential ingredient in maintaining public trust in a policy, process or system.

The last concept in the value framework is that of **equity or fairness**. Public servants are increasingly expected to consider whether their decisions and recommendations are fair, both in substance and process.

Each of these values from the value framework was used in the thesis as a conceptual tool to assess the suitability of MFIPPA to school boards.



## **ENDNOTES TO CHAPTER 1**

1. See Appendix A for a copy of the questionnaire sent to 102 Ontario school boards which represented a cross-section of very small, small, mid-size, large and very large boards from different regional areas of Ontario. Fifty per cent of the boards responded to the survey and provided the data base for this thesis.
2. This value framework was first set out in Kenneth Kernaghan, "Changing Concepts of Power and Responsibility in the Canadian Public Service," Canadian Public Administration, vol.21 (Fall 1978) pp. 389-406.
3. Kernaghan, Kenneth; Siegel, David, Public Administration in Canada. A Text 2nd edition. Scarborough: Nelson Canada, 1991, p.282.
4. Ibid, p.282.
5. Ibid, p.282.
6. Ibid, p.283.
7. Ibid, p.284.

## **CHAPTER 2**

### **HISTORICAL DEVELOPMENT OF ACCESS TO INFORMATION LEGISLATION**

#### **I HISTORICAL REASONS FOR RESTRICTING PUBLIC ACCESS TO GOVERNMENT INFORMATION**

Today's society views access to information at all levels of government as a prerequisite to an informed electorate. Public accountability is an expectation of premiers, cabinet ministers, aldermen and trustees alike. But it took many years of debate and public pressure before the current federal, provincial and municipal legislation established a statutory "public right to know" about information that previously had been kept secret. A brief review of some of the obstacles that prevented legislative reform taking place earlier or faster helps to explain the political concerns and the public pressure that ultimately gave rise to freedom of information legislation. It also illustrates why the arguments for access to information in the federal sphere may not be applicable to local government institutions like school boards.

Historically, restrictions on access to information were based on the tradition of official secrecy and the accompanying attempt to maintain ministerial responsibility within our parliamentary system of government. The overall need to preserve national security was also cited as a primary consideration for declining to disclose information that could be detrimental to the public interest. Each of these factors, which will be reviewed in the following paragraphs, contributed to the slow development of access legislation. It took a period spanning almost three decades before statutory permission was given to grant access to certain information held by the federal, provincial and, most recently, municipal levels of government.

### **(A) Parliamentary Supremacy**

British parliamentary practice includes the following features: the common law doctrine of Crown privilege; the tradition of ministerial responsibility; the historical government preference for confidentiality; a classification system for government documents designed to preserve their secrecy; and an anonymous public service conditioned to adhere to bureaucratic secrecy and governed by the policy that all documents are secret unless specifically declared to be public.

(1) In Canada we have inherited the British system of "parliamentary supremacy" according to which Parliament can make any law and no person or body can override or set aside legislation validly enacted by Parliament. Theoretically, this means that nothing is beyond parliamentary authority and the courts are subordinate to the legislative branch, that is, the courts recognize as law the rules which Parliament makes by legislation. (2) The parliamentary system of government tends to perpetuate a paternalistic view about the state. By its design a parliamentary system means political power is only regulated by and subject to regular elections. It is of course influenced heavily by such organizations as the media and pressure groups. Aside from these periodic checks the Canadian political system operates in a quasi-autonomous fashion by relying on the integrity of elected officials; this can result in declining public trust in them and a growing abuse of political power. Restricted access to information also means that opposition politicians are less able to question or criticize public servants, at least on an informed basis. Maintaining the balance between the parliamentary tradition of government accountability to the electorate and the public's right to know is an ongoing challenge.

### **(B) Ministerial Responsibility**

The notion of ministerial responsibility is inherent in the concept of parlia-

mentary supremacy. It has been defined as "a constitutional convention that the Cabinet and its members are individually and collectively responsible to the House of Commons." (3) Since the Cabinet is selected from the ranks of the political party commanding the majority of seats in the House of Commons, governing ministers have the authority to force bills through the legislature. Intrinsic to the parliamentary system is the principle that each member of the government (i.e. the Cabinet) must publicly support all activities and policies carried out in the name of the government or resign. Consequently, our political system allows a decline in the effectiveness of the legislature in representing the will of the voters or in responding to their concerns, and thereby jeopardizes overall public respect for government institutions. Despite the personal views of elected officials, the reality is that party solidarity usually prevails over any decisions to resign, and the false commitment to a government position only fortifies the growing mistrust of the electorate.

Some have expressed the view that ministerial responsibility is an outdated concept in light of the growing complexity of government activities. (4) The volume of activity has in practical terms made it impossible for a minister to exercise complete control over his/her department or portfolio. Instead, the minister must rely on non-elected public servants for their expertise and recommendations. But are the public servant's decisions about policy-making and administration to be regarded as actions of the minister? In practical terms they are, since many elected officials lack the personal knowledge of, or experience in, their portfolio, and must rely heavily on public servants for advice and for the administration of policies and programs. In the management of government information, this creates a conundrum for public servants who must face the daily dilemma of determining what should be disclosed and what should be kept as secret. The greater administrative secrecy of government; the greater the lack of public confidence.

### **(C) Tradition of Official Secrecy**

Public servants swear an oath of office and secrecy not to disclose information gained through their employment. Adherence to this oath is maintained by the threat of administrative or criminal sanctions for any breach.(5) In addition the concept of "government property" in information is codified in the federal Official Secrets Act.(6)

Many feel that the official secrets legislation has fostered a general aura of secrecy about government in Canada. The Mackenzie Commission described the Canadian Official Secrets Act as "an unwieldy statute couched in very broad and ambiguous language and possessing unusual and extraordinarily onerous evidentiary and procedural provisions." (7) The Act also imposes penalties for communications of secret information by recipients of official information (most often the press, but potentially anyone); for unlawful retention of documents; and for failure to take reasonable care of retained documents. (8) All information learned by public servants in the course of their duties is considered "official" regardless of its nature, importance or original source. Consequently, while freedom of information laws seek to regulate the public's access to government information which is not deemed secret, official secrecy legislation continues to concern itself with the protection of secret government information from unauthorized disclosure.

### **(D) Judicial Deference to Ministerial Discretion**

Historically the tradition of official secrecy created procedural obstacles to those seeking to secure access to government information primarily because of the broad discretion granted to the minister's public servants and the deference provided by the judiciary in support of the minister's decisions. If the minister

made an executive decision to refuse access, then an individual had no recourse of appeal except to commence an action in the Federal Court by way of seeking the issuance of a prerogative writ of mandamus, and then only when he or she had the requisite "standing." (9) If the Crown could demonstrate that its servant was acting in his or her official capacity and there was no statutory duty obligating him or her to produce the document, the Crown could successfully defend any action for disclosure. This was usually not difficult since most statutes are either silent as to the public's access to government papers, or explicitly stipulate non-disclosure. Of more significance was the fact that there was a need for costly and time-consuming legal proceedings to challenge an administrative decision, which in itself would have discouraged most citizens from pursuing the release of the information. (10)

A further frustration was the attitude of the judiciary. Historically judges deferred to executive decisions by ministers on the basis that the protection of the public interest was paramount, and must override any private right to production or disclosure. This reasoning enabled government officials by the mere classification of documents to shield them from public scrutiny. For many years Canadian courts accepted the principle of "Crown privilege", whereby if the appropriate minister swore in an affidavit that disclosure of the requested document would be contrary to the public interest, as evidenced by its contents or the class of documents, the court would, without consideration of any other underlying motives, support the minister's decision. (11) The judiciary has been criticized for not challenging the merits and motives of whether such blanket protection was justified. Interestingly, until 1968 the courts never attempted to invoke their judicial discretion or power to inspect the documents "in camera" in order to determine the propriety of the ministerial objection. However, the Conway & Rimmer (12) decision granted the courts the authority to inspect documents in camera and to overrule the past practice of Crown privilege. This case gave the

judiciary the opportunity to demonstrate both the public's interest in the administration of justice and the need for the judiciary to retain the power to assess on a case-by-case basis whether the contents are to be protected or severed, or disclosed partially or completely. Decisions such as this made it clear that the mere labeling of a document as official or confidential did not always in itself warrant its non-disclosure; rather there needed to be some potential injury to the public interest as well.

Theoretically the Canadian judiciary is independent and is not politically responsible to either Parliament or the executive, so it can be characterized as impartial. This independence would allow for the courts to intervene in complaints about access to information and help quash any public concerns that an official's refusal is a cover-up. While ministerial responsibility may be threatened by subjecting the minister's claim of privilege to judicial review, the judiciary represents the only alternative social institution to which the executive would conceivably surrender sensitive documents for detailed scrutiny. In addition, courts have the benefit of securing the assistance of experts in deciding complex matters, and the option of determining these matters in camera, both of which would be beneficial in the adjudication of freedom of information questions.(13)

Unfortunately, in 1970 the Federal Court Act by section 41 codified the law and curtailed the court's jurisdiction (as derived from the Conway & Rimmer decision) to examine any documents in matters of "international relations, national defense or security, federal-provincial relations, or Cabinet confidences, " when a Minister's affidavit certified a potential injury arising from disclosure.(14) This legislation abrogated the rights of litigants to challenge a ministerial claim for protection by giving the ministerial affidavit a conclusive status. It appears we came full circle with the enactment of this legislative protection.

## **(E) Preserving National Security**

We live in a security-conscious world. Confrontation between world powers and the continuing presence of terrorism dictate the necessity for measures to guard our national security. Few would argue that information about our nation's security does not require protection from unauthorized disclosure. Information truly relating to national security is generally not for public consumption. Many of the most controversial cases concerning the proliferation of sensitive information have related to the preservation of our national security. (15) The courts have been very sensitive to the executive's plea that national security is at risk, and have been reluctant to investigate these assertions. The resulting dilemma is that the public has no opportunity to review or seek accountability from the security and intelligence services which claim confidentiality of documents in the interest of preserving national security.

One of the initial problems is the ambiguity inherent in such vague terminology as "national security"-- which even today remains undefined. What criteria should the executive employ to reach a conclusion that the documents fall within this class of protection, and what degree of potential harm must be perceived? Could not the perceived harm depend on the individual identifying and classifying the documents in question?

According to the MacKenzie Report, there have been four categories of classified documents, namely, Top Secret; Secret; Confidential and Restricted.(16) The classifications are in themselves ambiguous to apply. In practical terms, the more likely information is perceived as "Top Secret" the more likely barriers will exist to preclude its disclosure. This issue of "subjectivity" continues to be a legitimate concern when different individuals with differing values and views are able to classify documents. Naturally the potential for abuse is real, especially in circumstances of covering up a politically embarrassing doc-



ument. But why all the need for "secrecy" if not for the preservation of national security? Rowat attributes the secrecy to the need to conceal mistakes, favoritism, political patronage, wrongdoing or corruption. (17) Overall the cumulative effect of the oaths of secrecy, the Official Secrets Act, the document classification system, and the limited role of the judiciary to intervene, helped to perpetuate the veil of secrecy surrounding some matters, and eventually contributed to the demand for greater openness from government and more public accountability.

## **II FACTORS THAT GAVE RISE TO THE DEMAND FOR PUBLIC ACCESS TO INFORMATION**

### **(A) Political Accountability**

Several factors have influenced the rise of the "access" debate. "The lack of effective legislation on access to government documents has contributed to the developing lack of trust between the people of Canada and the government leading to what can be termed as a crisis of confidence." (18) The social environment, the political atmosphere, and the public's perception that the large complex, government machinery was alienating it and leaving the electorate with no control over government actions, all contributed to the adoption of access to information legislation. Donald C. Rowat explained the problem this way. "Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withheld information for their own convenience or for fear of disapproval by their superiors, and will not change their ways unless they are required by law to do so." (19) For this reason the access policy debates, and the accompanying legislative deliberations, needed to focus on the drafting of effective legislation to solve problems created by administrative secrecy and the perceived lack of political accountability.

Promoting "access" is consistent with democracy. It also helps ensure that the public will be protected from arbitrary governmental actions and that it will have meaningful information about matters of public importance. Generally, access is perceived as encouraging an accountable and responsible government. (20) But there is a danger in assuming that the ability to obtain more information about government means that a more open government exists. This danger is present in the confusion that surrounds the use of some terms, which while used interchangeably, are not synonymous. "The terms access to information, administrative disclosure, freedom of access, open government, freedom of information and the right to know, are often used interchangeably to describe the key principle of legislation which provides for significant public access to government documents." (21) Open government is not synonymous with freedom of information. While the availability of more information enables a more democratic process, open government is a broader concept than just freedom of information. The provision of information is only one feature of open government. There is also a need for the opening of channels of government decision-making and wider debate on the assessment of priorities and the appraisal of programs and policies. However, the opportunity to debate and evaluate programs and policies must be supplemented by the release of informative materials in order for there to be meaningful input on whether or not government proposals should be confirmed or rejected.

### **(B) An Informed Electorate**

The public in growing numbers was demanding that it be fully informed about government policies and programs. The public wanted full, objective and timely information. The "right to know" the content of government information was justified by the fact that knowledge is power. The ability of government to

determine what is released to the public and what is kept secret violates a fundamental principle of democracy, that of an informed electorate. Aside from being an invitation for abuse by those in power, censoring fosters mistrust and uncertainty among the electorate. Professor Leon Dion suggested that the growing gulf between those who participated in public affairs, and those who did not, could be explained in part "by the lack of resources which would make this participation meaningful....among those resources, the most commonly wanting ....is the information factor." (22) How can people be expected to vote on issues when there is an underlying suspicion, and in some cases awareness, that they are being denied significant information?

The public demand for access to information held by government was a reflection of "the growing need for an open society; the need to have a more informed society; the realization of the rights of taxpayers to information and resources paid for with their tax dollars; and the public's rebellion against the manipulation of information by governments."(23) In 1965 Professor Rowat examined the effects of administrative secrecy in Canadian government and concluded that the British tradition of secrecy was unsuitable to modern democracy where people must be informed about governmental activities, and that without access undesirable effects, including the propensity for information manipulation and for its use in a propagandistic manner, would continue to exist.(24) The growing consensus was that access to government information, at whatever level, was and is essential to an effective participatory democracy.

While access to information is important, so is the reliability of the information obtained. "It makes little sense to be given access to government information when there is no independent method of checking its accuracy and reliability, and no way of ensuring that government has given a full account of what it has been up to, and of knowing what alternatives to preferred options there are."(25)

### **(C) Computer Technology**

A third factor giving rise to the demand for public access to government information was the emerging use of computer technology. The computer age has had a profound impact on modern society by rapidly increasing our ability to collect, store, retrieve and transmit information. Many aspects of our lives rely on or function with the assistance of information repositories and retrieval systems. Even more significant are the number of information systems governing our lives that are under the control of various levels of our government. Invariably the control of information is a preoccupation of government due to its jurisdiction over such crucial areas as taxation, defense, administration, foreign policy and law enforcement. It is not surprising that access to and regulation of government information banks has become an important issue.

The speed and ease of transferring information locally, nationally, and globally is a revolutionary process and a powerful force. The widespread use of personal computers, and the accompanying familiarity with such technology, including its networking features, has made us an "information society." "Information can be stored, retrieved, communicated and broadcast at phenomenal speeds -- rearranged, selected, marshalled and transformed." (26) The general public and the IPC Office both recognize the awesome power behind such an information base. The IPC Office is actively pursuing a number of policy initiatives which would encourage government organizations to build in access and privacy considerations at the early design stage of any new database. (27)

Computer technology has also meant that large quantities of data can be transmitted between countries, necessitating safeguards to ensure its protection. Due to the fact that restrictions on the flow of information could disrupt important sectors of the economy such as banking and thereby affect trade and international business, the Organization for Economic Cooperation and Development

(OECD) developed guidelines which were passed in 1980 in an effort to harmonize national information legislation with the international flow of data. The problem is that Canada (along with Ireland, Turkey and the United Kingdom) abstained from the recommended guidelines. In addition, not all member countries have adopted the guidelines in their legislation. Furthermore, Canada has international relations with countries such as India and Mexico that do not even have access to information or privacy legislation.(28)

### **III CANADA'S FIRST RESPONSE: THE FEDERAL ACCESS TO INFORMATION ACT**

The movement toward greater openness by government was reflected in the tabling of proposed legislation at the federal level, and subsequently in Ontario. Several other provinces had enacted access to information legislation prior to that of the Canadian federal government.(29) Before the legislation was passed private members' bills were introduced in most jurisdictions and various commissions were set up to examine the question of the government's obligation to supply information.

While the Federal Access to Information Act and the separate Privacy Act (introduced as Bill C-43) were passed on July 7th, 1982, they were not proclaimed into law until July 1st, 1983. The enactment of the federal legislation resulted from 17 years of discussion, debate and pressure from lobby groups.(30) The voices of concern that arose during the 1960's civil rights movement began a long parliamentary debate on administrative secrecy which culminated in the proclamation of the federal Access to Information law in 1983.

### **IV LEGISLATIVE DEVELOPMENT OF ONTARIO AND MUNICIPAL ACCESS TO INFORMATION**

Various private members' bills (31), lobbying by such special interest groups as "Access Ontario" (32) and publications by the academic community

between 1965-1977 were also placing pressure on the Ontario government to act. However, the provincial government's reaction to the public's demand for greater access to information was much slower in coming in Ontario than in other provinces (33). It was not until June 19th, 1987 that Ontario gave Royal Assent to the Freedom of Information and Protection of Privacy Act, 1987, (hereinafter referred to as FIPPA) and it did not come into force until January 1st, 1988. Unlike its federal predecessor, the Ontario legislation attempted to integrate two concepts into one statute, the public's right to know and an individual's right to confidentiality of personal information.

Prior to the enactment of access legislation in Ontario, it was the subject of exhaustive studies, some of which centred on the need to alleviate the obstacles created by the traditional secrecy surrounding government decision-making. While the Federal government in 1969 had a Task Force on Government Information, followed by a Privy Council Office Report in 1974, entitled The Provision of Government Information (also known as the Wall Report), the Ontario government also investigated the need for changes in the tradition of administrative secrecy by establishing in 1972 the Committee on Government Productivity. (34) By far the most significant provincial study was the Williams Report.

In March of 1977 the provincial government established the Commission on Freedom of Information and Individual Privacy, which was to investigate and prepare a report to the Ontario Attorney-General (then Roy McMurtry). Under the leadership of D. Carlton Williams, the Commission worked for three and one-half years drawing upon the resources of its own research staff and arranging for 17 background research papers to be prepared by scholars and representatives of interest groups. After extensive research efforts, which involved 26 days of public hearings in ten communities across Ontario and the receiving of 15 briefs, the Williams Commission submitted its final three volume report, entitled Public

Government for Private People to the Ontario Legislature in August of 1980. The report contained 141 recommendations and cost the taxpayers \$1.7 million.(35) While the cost and the investment of time and effort warranted immediate action in the drafting of legislation, political factors intervened (36) and further delay prevented the enactment of legislation on access to information. Nevertheless, the Williams Commission did establish the dual principles which would subsequently be codified into one statute, the Freedom of Information and Protection of Privacy Act, 1987. Unlike the federal Act, both freedom of information and protection of personal privacy would be combined under the umbrella of one statute.

The majority of the recommendations in the Williams Report were eventually incorporated into Bill 34, An Act to Provide for Freedom of Information and Protection of Individual Privacy. Bill 34 was introduced by then Attorney-General Ian Scott in 1985, and then re-introduced in 1986. After second reading it was referred to the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions, subsequently renamed the Standing Committee on the Legislative Assembly. In a two-year period, close to 100 individuals and groups made written and oral submissions on the bill during the Committee's clause-by-clause review. Finally it was referred to the Committee of the Whole House. During both of the latter two stages of this legislative process, a number of amendments were introduced. The two most significant to this thesis were the inclusion of provisions that in three years municipalities would come within the scope of the Act, and that the Office of the Information and Privacy Commissioner would be required to educate the people in the province about the law, to ensure that the "right to access" was one that was exercised.

Bill 34 was finally given third reading on June 25th, 1987 and Royal Assent on June 29th, 1987, but it did not come into force until January 1st, 1988. The purpose of the delay was to provide the new Information and Privacy

Commissioner with the opportunity to establish his office prior to the Act coming into force. The function of the Commissioner's Office, which initially consisted of three branches -- Corporate Services; Legal Services; and Compliance-- was to serve as an independent review body for those who had been refused access to government records, or as an avenue of redress for those who had otherwise been affected by a decision of a government institution. Mediation would be attempted first to resolve disputes and complaints, but when this was ineffective, an inquiry would be conducted to settle the dispute, resulting in the issuance of a binding order which, other than being judicially reviewed by the courts, was final in nature.

This extension of the legislation to municipalities and boards caused great concern, partially due to its timing, but primarily due to the lack of input from these affected institutions. During 1977-1980, the Williams Commission, upon whose report most of the legislation is based, did not formulate recommendations dealing with local government institutions, such as municipalities, school boards or agencies. In fact very little reference is given to boards of education or to school issues (aside from the topic of pupil records) in the three volumes of the Williams Report. Therefore, it seems inappropriate that such a major amendment be given such a late introduction without affording an opportunity for public hearings or sufficient input on the practical effects of such a decision. Interestingly while it had taken years for the federal and provincial legislation to be passed, MFIPPA became law in a matter of a few months. Originally referred to as Bill 49, it was introduced for first reading on July 20th, 1989, and received Royal Assent on December 14th, 1989.



## **ENDNOTES TO CHAPTER 2:**

1. Doern, G. Bruce, "Canada" in Galnoor (Ed.), Government Secrecy in Democracies (1976), pp.143, 145-146.
2. Rankin, T. Murray, Freedom of Information in Canada: Will the doors stay shut? Chapter 4, "The Courts and the Defense of Ministerial Responsibility and Parliamentary Sovereignty," p.109.
3. Ibid, p.111.
4. Babcock, J.T., "Freedom Of Information in Ontario: To Be Or Not To Be? p.124.
5. Official Secrets Act, R.S.C. 1970 c.O-3 as amended. The Official Secrets Act is supplemented by the Criminal Code provisions relating to treason, breach of trust by public officers, sedition and sabotage, all of which are offences concerning national security. The original 1939 Official Secrets Act was an amalgamation of the British Official Secrets Act of 1911 and 1920. The inadequacies in the Canadian version were the subject of two Canadian Royal Commissions (Taschereau/Kellock Report, 1946; and the Mackenzie Report, 1969) and a Green Paper in 1977 on the related issue of Open Government, and then the McDonald Commission in 1979.
6. Rankin, op.cit., p.32.
7. Government of Canada, Royal Commission Security Report(Abridged)(1969), also known as the Mackenzie Report at pp.75-76.
8. Official Secrets Act, Supra. ,sections 4(3) & 4(4). The operation of the Official Secrets Act was scrutinized in the Treu v. The Queen case reported at (1979) 49 C.C.C. (2d) 222 per Pare, J.A. This case involved an engineer under personal contract with the government, known as Peter Treu, who had been cleared by security to handle sensitive documents. He was charged under the Official Secrets Act for retention and failure to take reasonable care of official documents. At trial he was convicted and sentenced to two years in prison, but the convictions were reversed on appeal because the court believed his claim that he in good faith believed himself to be properly cleared for possession and use of the documents. The case raises some interesting questions about the need for clarity in the classification of documents, and also the ease of prosecutions under this Act due to its broad language.
9. In the legal context the requirement of "standing" is determined by the Courts. It means an individual must have a personal interest at stake in a matter and a special interest in the subject matter of the litigation over and above that of the general public.

10. Rankin, op.cit., pp.8-9.
11. Ibid.,p.13.
12. Conway & Rimmer [1968] A.C. 910, House of Lords decision. This case involved a police officer's action for malicious prosecution against his former superintendent. The court ordered the inspection of the documents by the court and ultimately the disclosure of the documents, when the ministerial objection was ruled as insufficient to justify their retention on the basis of injury to the public interest.
13. Rankin, op.cit., p.25.
14. Ibid. p.128.
15. Birkinshaw, P., Freedom of Information. The Law, the Practice and the Ideal, p.22.
16. The Mackenzie Report is also known as the Report of the Royal Commission on Security, June, 1969.
17. Rowat, D.C., "The Right of Government Information in Democracies," Journal of Media Law & Practice, Vol.2 No.3. ,1981, p.314.
18. Rankin, op.cit., p.130.
19. Rowat, op.cit., p.330.
20. Siegel, Arthur, "Communications & Politics: Canada's Cautious Steps Toward Open Government," Canadian Journal of Communication 7:2 (1980) pp.26-37.
21. Gibson, P., "The Role of Ideas," p.4.
22. Rowat, D.C. "The Making of the Canadian Federal Access Act," p.5.
23. Filipov, B.R., "Public Access to Policy Information" in Donald C. Rowat edition of Provincial Policy-making: Comparative Essays (Dept. of Political Science, Carleton University, Ottawa, 1981) p.184.
24. Rowat, D.C., "How Much Administrative Secrecy?" The Canadian Journal of Economics & Political Science 31 (Nov. 1965) pp. 479-498.
25. Birkenshaw, op.cit., p.2.
26. Ibid., p.6.

27. Information and Privacy Commissioner/Ontario. The 1992 Annual Report. Office of the Information and Privacy Commissioner/Ontario. Toronto: 1992, p.3.

28. The Organization for Economic Cooperation and Development . Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (Paris, 1981) p.5. Canada has economic ties with such countries as .Mexico and India, countries which do not have access to information or privacy legislation.

29. The Government of Nova Scotia enacted its Freedom of Information Act in 1977, the New Brunswick Right to Information Act, 1978 which came into force in 1980 and the Quebec Act on Access to Documents held by Public Bodies and the Protection of Personal Privacy which came into effect in stages between 1982 and 1984.

30. See essay by Paul Butler entitled "Public Access: the Problems of Implementing the Access Act of 1982" found in the text by Rowat, Donald C., Canada's New Access Laws: Public and Personal Access to Governmental Documents, p.5.

31. FIPPA came a long way from the initial two-page Bills introduced by Donald G. MacDonald (Bill 97 (1975); Bill 28(1975) and Bill 22 (1976)) with its unrefined terminology (ie. use of word "document" instead of "record"); the use of the Ombudsman's Office (as opposed to a separate Information and Privacy Commissioner) and the lack of critical time frames to ensure expedient responses (ie. used phrases such as "as soon as possible" rather than specific time periods). Nevertheless, Mr. MacDonald's Bills did achieve the purpose of creating a momentum for the consideration of the issue of achieving access to government information.

32. Babcock, p. 133. "Access Ontario" was a pressure group consisting of twenty well-known and respected associations.

33. Several provinces had already established access to information legislation in advance of Ontario, namely, Manitoba with its "The Freedom of Information Act, S.M. 1985-1986, c.6; New Brunswick, with its "Right of Information Act" S.N.B. 1978, c.R-10.3 as amended; Newfoundland, with its "The Freedom of Information Act," S.N. 1981, c.5 as amended; Nova Scotia, with its "Freedom of Information Act," S.N.S. 1977, c.10 and the subsequent "Freedom of Information Act, 1990" S.N.S. c.11 and Quebec with its "An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information," S.Q. 1982 c. 30, as amended.

34. Babcock, op.cit.,p125.

35. Ibid, p.126.

36. Such political factors as the March 1981 General Election which gave the Conservatives a majority government; the Attorney-General's opposition to the legislation; the lack of interest by some Cabinet Ministers; the decision to strike another Task Force to prepare a White Paper on the subject (despite the William Commission's extensive recommendations.)

### **CHAPTER 3:**

#### **MUNICIPAL ACCESS TO INFORMATION LEGISLATION**

In accordance with the provisions of the province's directive, municipalities and school boards in Ontario were forced to prepare within a relatively short period of time to implement an Act that had significant implications for their operations. The first hurdle was to become familiar with the requirements and responsibilities of institutions and boards under MFIPPA. In this regard, informational seminars and workshops were available to provide some guidance to those assigned or assuming leadership in implementing the Act, but the more in-depth in-house staff training sessions remained the responsibility of each institution. The next step was to pass the appropriate bylaws designating the "head" under the Act, and then to initiate the onerous task of creating the necessary directory of records and other documents for public information, as well as to develop administrative policies and procedures for the processing of requests for information under the Act. The purpose of this chapter is to provide an overview of the Act's legislative requirements and its contents, with specific reference to the exemptions, the response timelines for inquiries, and the appeal process. This information is necessary as a basis for the analysis of the nature and impact of subsequent Orders made by the Commissioner's Office involving school boards, as outlined in Chapter 6 of this thesis.

There are primarily two key components to this legislation: first, the Act provides a right of access to information held by an institution (subject to certain exemptions); and second, it provides protection to an individual about whom personal information is being retained in the custody or control of an institution covered by the Act.

It is important to remember that previously existing information practices were to continue after the Act came into force, but how comfortable school boards felt in this area is questionable. According to the Commissioner's Office, the Act was not intended to replace the normal process of providing information to the public. School boards routinely responded to oral and written requests from the public to provide information on an informal basis because each is a public body established for a public purpose, and its operations are paid for by public tax monies. Therefore, it was expected that information available to the public before the Act was in force would continue to be available in the same manner, with the only exception being the disclosure of personal information. It was not the intent of this legislation to introduce bureaucratic steps to impede the normal existing exchange of information; rather its purpose was to offer the public an opportunity to request information which was not otherwise available through the usual channels. At the same time, any prior existing non-disclosure provision in other statutes (such as the Assessment Act (1) or the Education Act (2) or the Municipal Elections Act (3)) concerning the maintaining of confidentiality would continue to prevail.

## **(A) OVERVIEW OF THE MFIPPA LEGISLATION**

In order to appreciate what impact the legislation has on school board staff and operations, one needs to be familiar with the legislation, its terminology and its key principles. The following paragraphs will provide an overview of the legislation. To see the Act in its entirety see Appendix Q. In general the Act is divided into four parts as follows:

### **Part I: (Sections 4 - 26) Freedom of Information**

This part deals with the right of access to records, the exemptions to that right, and access procedures.

#### Part II: (Sections 27 -38) Protection of Individual Privacy

This part concerns the collection, use and disclosure of personal information and outlines how an individual can achieve access to his or her own personal information for the purposes of examining or correcting the information that has been retained.

#### Part III: (Sections 39 - 44) Appeal

This part deals with the right to appeal at various stages of the proceedings and the procedure involved in appealing a decision made by an institution.

#### Part IV: (Sections 45 - 57) General Section

This part covers general matters, including the charging of fees, offences, regulations and the powers and duties of the Information and Privacy Commissioner.

The legislation is based on the four following principles:

1. Information held by an institution covered by the legislation should, in general, be available to the public;
2. Exemptions from the right of access to information should be limited and specific;
3. Personal information held by institutions should be protected from unauthorized disclosure; and

4. Decisions relating to access to information should be reviewed by an independent body, namely the Office of the IPC/Ontario.

**(B) IMPACT OF THE MFIPPA LEGISLATION:**

In order to implement this new legislation each school board was expected to become familiar with the Act; learn its new terminology and its exemption provisions; create an inventory of its records; review and sever records; recognize requests for third party information; and establish a procedure for handling inquiries.

**(i) New Terminology to Learn**

To appreciate fully the scope of the legislation there are a number of key definitions or terms with which a school board and its trustees should be familiar. One important term used in the legislation is that of "record." Under the Act "record" is broadly defined as any record of information, however recorded, including printed material, information on audio or videotape and information stored electronically or by any other means. This includes correspondence, minutes, reports (inclusive of drafts), photographs, computer tapes and discs, handwritten notes and files, staff, board and council or business diaries and any other recorded information that is in the custody or control of an institution. The significance of this broad definition is compounded by the fact the legislation applies to records created both before and after the Act came into force in 1991, and by the fact that the legislation requires a minimum retention period of one year.

Each board was responsible for actively preparing an inventory of all of its records. In this process a school board would establish what type of files and



information were being retained; determine if it was necessary to continue maintaining them at all; and establish a file management system so that retrieval time could be minimal.

Since Part II of the Act is considered the Privacy Code the term "personal information" also needs to be defined. The legislation was designed to protect the privacy of individuals with respect to personal information about them that is being retained by institutions. Personal information means recorded information about an identifiable individual, including, but not limited to, the following:

- Information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual;
- Information relating to an individual's education, financial transactions or medical, psychiatric, psychological, criminal or employment history;
- Any identifying numbers or a symbol that are assigned to an individual;
- An individual's address, telephone number, fingerprints, or blood type;
- An individual's opinions or views (except where they relate to another individual in which case they are the other individual's personal information);
- An individual's name where it appears with other personal information about the individual.

## **(ii) Establishing a Procedure to Process Inquiries**

The Act's provisions relating to personal information are of extreme importance to a school board's human resources department, and any other department retaining confidential personnel files. Employees of a school board, such as teachers, custodians and administrators, will have the opportunity to make requests for access to information under the Act and to correct existing information, at no cost to the employee.

The request for any information under the Act must be in writing, must be made to the head of the institution, who ultimately decides what is to be disclosed, and must be in sufficient detail to enable the school board to locate the respective record. Any person can make a request for access to records. The term "person" under the Act is defined as including an individual, his or her personal representatives or executors, the custodian of children under age sixteen, an authorized person who has obtained the written consent of the individual, and organizations such as corporations, partnerships and sole proprietorships. Unlike the Federal Access to Information Act, the right of access is not limited by citizenship to those who are Canadians, or by place of residence. The rights and powers which an individual may exercise include the right to make access requests, the right to consent to the collection, use and disclosure of personal information and the right to request correction of existing personal information being retained by the institution.

### **(iii) Learn and Apply the Exemptions**

There are two types of exemptions in the legislation: mandatory exemptions (a Head shall refuse to disclose) and discretionary exemptions (a Head may refuse to disclose). Unfortunately it was felt some matters would not fit under either classification system, so it is important to remember that there are some exceptions to the exemptions listed under the Act. In addition, more than one exemption may apply to a requested record. Lastly, a record can be severed so that an exemption may apply to only part of a requested record.

In general, mandatory exemptions require an institution to refuse to disclose a record if it falls under the scope of the exemption, subject to certain exceptions. The three mandatory exemptions are:

- (1) information that relates to relations with the federal or provincial government if the information was received in confidence (s.9);
- (2) third party information if supplied in confidence and its disclosure could prejudice the interests of the third party (s. 10); and
- (3) personal information about individuals other than the requester (s.14).

Each of these exemptions provides an exception, such as where consent is given for the record to be disclosed, or where there are compelling circumstances.

In contrast, discretionary exemptions allow the institution to subjectively and independently determine whether it will or will not disclose the requested information subject to certain exceptions that require some records to be disclosed. If the requester is unsatisfied the institution's decision can be appealed.

Discretionary exemptions apply to the following types of information and records:

- (1) draft by-laws, private bills and records of closed meetings where such are authorized by statute (s. 6);
- (2) advice or recommendation of an officer, employee, consultant, except where the material relates primarily to factual information or statistical surveys, evaluator reports or environmental impact statements and records that are over twenty years old (s. 7);
- (3) records relating to law enforcement, police investigations, prosecutions (s. 8);
- (4) information which could prejudice the economic, financial or other specified interests of the institution, such as trade secrets or technical information (s. 11);
- (5) solicitor-client privilege (i.e., all communications of a confidential nature made between an institution and its legal advisors or papers prepared by or for the legal department in contemplation of litigation )(s.12);
- (6) information which could endanger the safety or health of an individual (s. 13); and,
- (7) information already available to the public or soon to be published (s. 15).

Certain exemptions do not apply if a compelling public interest exists in dis-

closing the information (s. 16). In addition, the head of the institution is required to disclose information where there is a grave environmental health or safety hazard, regardless of whether a formal request has been received (s. 5(l)).

#### **(iv) Severing the Records**

In some instances a document may contain both exempt and non-exempt material. On these occasions the exempted material must be removed or obliterated, and the balance of the record disclosed to the requester. This involves the severing of the records before disclosure. Administratively this can be a very time-consuming process.

#### **(v) Recognizing Third Party Information**

In accordance with section 10 of the Act, a board of education shall not disclose any records relating to third party information (such as trade secrets, scientific, technical, commercial, price lists, financial or labour relations information) that has been supplied in confidence by a third party and which may result in specified injury if disclosed. If, after reviewing the material, the school board intends to release the information, the head is obliged to give notice to the third party so that he or she has an opportunity to make representations on the suitability of its disclosure (section 21). This section of the Act has been the subject of several Orders, and will be addressed in chapter 6.

#### **(vi) Who will pay the cost?**

An enormous amount of work has been generated by this legislation. Since each school board's participation in the Act is compulsory, rather than

optional, there is a need to address the issue of the additional staff time and other indirect costs assigned to the institution. Unfortunately the regulations do not provide the means of recovering all of these inherent costs; nor were school boards the recipients of additional provincial dollars or grant monies to cover the cost of this added responsibility. Under section 45 of the Act the institution may charge fees for search time necessary to locate the file in excess of two hours, and for time preparing the record for disclosure; and to photocopy or ship the information to the requester. Specifically, Ontario Regulation 517/90 passed in August of 1990 prescribed the fees that could be charged in this regard ( See Appendix "B"). While Ontario Regulation 517/90 is now known as Ontario Regulation 823 R.R.O. 1990, the amount of the fees chargeable under section 45 of the Act and regulations has not been changed. For example, photocopies are still 20 cents per page and floppy disks still ten dollars per disk, while the chargeable rate for search time is \$7.50 for every fifteen minutes.

However, no fees can be charged in the following situations:

- (1) if there is financial hardship;
- (2) if the fee would be \$5.00 or less;
- (3) if the individual making the request is seeking access to his or her own personal information; and
- (4) most importantly, a charge cannot be made for staff time required to review the file contents or to determine whether or not an exemption applies.

It is the last responsibility which will be the most time-consuming and costly in terms of staff time, and unfortunately it is not financially recoverable time. In addition, the Act provides for the calculation of "fee estimates" by the school board, when it is anticipated the cost for photocopying will exceed \$25.00. When a requested file is large, it would create an additional administrative task to review the file contents initially to determine the fee estimate, after which the

requester can exercise his or her prerogative to decline seeing the file, or to appeal the amount of the fee estimate or to appeal payment of the fee on the basis he or she meet the criteria for granting a waiver. So far the Office of the IPC/Ontario has determined that the Acts do not give the IPC the authority to award costs to a party in an appeal. (4)

### **(C) KEY DECISIONS TO BE MADE BY SCHOOL BOARD TRUSTEES:**

The Act applies to all "institutions", a term which is broadly defined to include municipal corporations, local boards and any additional agencies, boards, commissions, corporations or other local bodies that are designated in the Regulations. In accordance with this definition, entities such as boards of education are only responsible for their own operations and for agencies on which all members are chosen by or under the authority of the Education Act or pursuant to the authority vested in the school trustees, such as, the appointment of officials to the Special Education Advisory Committee (S.E.A.C.). In contrast, the transit commission, hydro-electric commission and public library are all designated as separate institutions for the purposes of this legislation. Consequently those entities are responsible for establishing their own inventories and responding independently to any inquiries made to them under the Act.

#### **(i) Designating the Head and Delegating the Power**

The "head of the institution" (as defined in section 3 of the Act) is the person(s) chosen by the school board from among the membership of the board to assume the duties assigned under the Act. School boards have several options as to how to administer the Act. In general, the designated head is responsible

for decisions made on behalf of the institution and for overseeing the internal administration of the legislation.

The board of trustees must pass a by-law designating a member of the board (i.e. the director of education, a trustee or the board chair) or establish a committee to be the " head". If it does not pass the requisite designating by-law then the entire board is deemed to be the head, which administratively would not be desirable in terms of responding collectively to requests for information. For the sake of efficiency the legislation allows the "head's powers" to be delegated. This means the school board can pass a further by-law delegating its powers and duties to an officer(s) in the corporation with such limitations, restrictions, conditions or requirements as it feels are necessary.

In this regard, it was the decision of most school boards to designate the director of education and secretary of the board to be the head of the institution, and then for the director to delegate his or her powers and duties to the corporation's appropriate senior management staff to serve as the freedom of information coordinator, who in all practical terms would respond to any inquiries. The rationale for this appointment and then delegation of responsibility can be attributed to the following factors:

(1) The director has a permanent office at the Education Centre and is accessible to both staff and the public. The director is by law the principal custodian of the board's corporate records in accordance with s.207 of The Education Act R.S.O. 1990, c.E-2. Therefore, it is appropriate under this legislation for the director to have the primary role in its administration.

(2) The Act requires the review of each and every document within a file to determine if it is accessible under the terms and definitions of the Act. That function

can best be monitored by the staff familiar with the files and their contents.

(3) Since this was new legislation there was some uncertainty as to the number of requests that would be received by the board. In the early stages reliance was placed on the experience of the federal and provincial governments, both of which were inundated with requests. While it was uncertain whether the school boards would have a similar experience, in practical term if all such requests were to be reviewed by the board as a whole the task would be very time-consuming, as well as rather awkward and inefficient, especially in light of the tight time lines for response.

(4) The statutorily prescribed time periods in which to respond to inquiries are quite stringent. Processing a request, locating the file, reviewing its contents and calling the members of the board or a committee together to make a decision about access to information within the 30 day time limit may be either impractical or difficult.

For the reasons outlined above, and in light of the values framework, the selection of the board chair as head and subsequent delegation of authority to the director was a significant step in efficiently and effectively coping with the legislation at the local level.

## **(ii) Responsibilities of the Head**

The general administrative and reporting requirements for the head of an institution under this legislation are listed below:

- adhering to time limits and notification requirements;
- considering representations from third parties who may be affected by the disclosure of records;
- making decisions regarding the disclosure of records, and responding to access requests;



- determining the method of disclosing records;
- determining whether some or all of the material may be exempt, and if necessary severing those portions which are not exempt from disclosure;
- responding to requests for correction of personal information;
- calculating and collecting fees;
- preparing and making available to the public descriptions of the general types of records and personal information banks maintained by an institution;
- where necessary, defending decisions made under the Act at an appeal before the Information and Privacy Commissioner in Toronto;
- administering the privacy protection provisions of the legislation;
- filing an annual report with the Office of the IPC/Ontario as required by section 26 of the Act.

#### **(D) EXPECTATIONS OF BOARDS PRIOR TO 1991 AND AFTER ENACTMENT**

In summary, prior to the legislation taking effect, each school board was statutorily obliged to do the following six things:

- (1) Pass a by-law designating a head of the institution, and thereafter the board of trustees may delegate certain duties and responsibilities to its officers.
- (2) Locate all its records and establish a records inventory list from all departments.
- (3) Make available to the public for inspection an index listing all general records and personal information banks in the custody of or under the control of the institution (s. 34).
- (4) Devise a policy and a tracking system for a fast and efficient method of locating records.
- (5) Revise the standard forms used by the school board to comply with the legis-

lation and the protection of personal information by including a disclaimer or waiver provision on them.

(6) Create a standard request form for the tracking of written requests made under the Act, along with standard form letters for responding to requests for information.

Following the coming into force of the Act on January 1st, 1991, an institution was statutorily obliged to do the following nine items:

1. Adhere to time limits and notification requirements.
2. Consider representations from third parties who may be affected by the disclosure of records.
3. Make decisions regarding the disclosure of records and respond to access requests within 30 days.
4. Respond to requests for correction of personal information.
5. Calculate fee estimates and then collect the fees when access has been provided.
6. Prepare a booklet or directory containing descriptions of the general types of records and personal information banks that are maintained by the institution.
7. Where necessary defend decisions made under the Act at an appeal in Toronto before the Information and Privacy Commissioner.
8. Administer the privacy protection provisions of the legislation.
9. File an annual report with the Office of the IPC/Ontario as required by section 26 of the Act.

#### **(E) ROLE OF THE COMMISSIONER'S OFFICE AND MANAGEMENT BOARD**

The Office of the IPC/Ontario(5) was established under Part I of FIPPA

entitled "Administration." While this office also hears the appeals under MFIPPA, to avoid duplication the provisions in Part I of FIPPA were not included in the municipal version of the Act. The current Commissioner, Tom Wright, was named to the post in April of 1991. Part I of the the legislation also authorizes the Commissioner to hire and appoint staff and delegate his or her powers. Presently there are two Assistant Commissioners and five Inquiry Officers who exercise delegated powers.

The Office of the IPC/Ontario is the watchdog over provincial and municipal governments and over local boards and agencies to ensure they comply with the provincial and municipal versions of the Act. It was established to review appeals from people who have been denied access to information, or who feel their privacy has not been protected, or to handle refusals to correct personal information, or to hear appeals about the amount of a fee to be charged for access to certain information, or in regards to any extension of the 30-day time limit to respond to a request.

Since the Commissioner is appointed on the recommendation of and is accountable to the Ontario Legislature (7) and is not a member of any political party or of the government of the day, this position is deemed to be independent and impartial for the purposes of conducting its duties under the Acts. Since 1991 the Commissioner has employed a team of five staff to deal with the influx of appeals and inquiries that arose as a result of the passage of the municipal freedom of information legislation, and its subsequent application to 3000 more boards and agencies. Included as Appendix "C" is an organizational chart of the Commissioner's Office.

The Commissioner's Office produces a quarterly release known as the IPC Precis (formerly referred to as the Summaries of Appeals), which highlights both the Orders and Compliance Investigations conducted by the office. (8) The latter refer to investigations into complaints about non-compliance with the legis-

lation, which result in a resolution by compliance , without there being a formal need to appeal which could result in an Order being issued. The Privacy Investigation Reports are not binding orders, but rather recommendations by the Commissioner's Office. An Order could only be issued in privacy complaints if the Commissioner determines that personal information has been improperly, or illegally collected, and the practice needs to stop, and the retained records destroyed. Unlike the Commissioner's access to information orders, the privacy investigation reports are only summarized in the newsletter, and are not available to the public through the government bookstore, without the parties' consent. In addition the name of the "offending institution" is also not identified, and instead the general term "board of education" is used in reference to school board cases.

In each edition of the *Precis*, orders are marked with a "P" to denote provincial orders, and a "M" to denote municipal orders. However, either level of government can refer to either set of decisions for guidance due to the similarity in wording of sections in both Acts. Several of the municipal orders have to date made reference to provincial orders, especially when a new issue at the municipal level is being addressed in an inquiry. The Office of the IPC/Ontario has now published a useful comparison chart cross-referencing the sections in FIPPA and MFIPPA. This table of concordance can be found at Appendix "D."

In April of 1992, the Commissioner's Office finally published an index by order and subject, but it was long overdue in light of the provincial legislation having been in effect since 1987, and the municipal legislation for almost 16 months. While the subject index produced by the Office of the IPC/Ontario is too lengthy to include as an Appendix to this thesis, included as Appendix "E" is the most recent published version of the Municipal Sectional Index citing the Order numbers which dealt with each section of the Act.

Another flaw in the system is the limited information provided in each highlighted order contained in the *Precis*. Unfortunately the *Precis* service is not

equivalent to a legal headnote routinely found at the beginning of each reported court case. The precis only represents a summary of the rulings in the cases, and cites the sections of the Act referred to, but does not include sufficient reference to the facts behind the order, or the arguments given to be of much assistance to others facing similar problems. In addition, this lack of factual information makes it difficult to distinguish the case, or to apply the principles to any other case. Since January of 1992 all copies of the complete orders must be purchased through the government bookstore, at an admittedly nominal cost, but at some inconvenience to those living outside of Toronto. The disappointing feature is that even when the entire order is purchased, the information contained within it does not extend much beyond the summary. For example, the specific nature of the objections raised in the written arguments presented by the parties is not contained within the orders. Since the legislation places the onus on the school board institutions to substantiate the reasons for refusing disclosure, no arguments are outlined in the orders on behalf of the appellants as to why they need this information, or what they will subsequently do with the information they secure.

Separate and apart from the Commissioner's Office is the Freedom of Information and Privacy Branch Management Board Secretariat.<sup>(8)</sup> The role of its staff is to set policies and guidelines, and to serve as a reference office to field questions about the workings of the legislation, and to provide instructional seminars, at least in the early stages of the enactment of the legislation.

### **(G) LOCAL GOVERNMENTS AND FREEDOM OF INFORMATION**

Locally elected officials are increasingly under pressure to be open to the public and to the press. There is a feeling that where there is more openness there is a corresponding reduction in the incidence of corruption and arbitrary decision-making.

In general, municipalities and school boards are the most heavily scrutinized by the public of any level of government, far more so than the provincial government. This can be attributed to several reasons. First, local governments hold frequent and regular meetings, most of which are accessible to the public. The decisions made by these committee or board members touch on the quality of life of communities. Second, municipalities and local boards have much more direct contact with their constituents than do the other levels and are most likely to deal with individuals on a personal basis. Third, the responsibilities of local government directly shape and affect the community in such essential areas as planning and development, utilities, educational programming and delivery of services. Municipalities and local boards exercise a wide range of powers and responsibilities delegated to them by provincial statute which potentially have a significant impact on the quality of life in a society. Some confidential information retained by a local board or municipality may itself be considered of economic value if released to certain individuals or local business entities, such as information about planning proposals and policy changes. Fourth, school board officials and municipal council members run for office as individuals, seeking out their own financial support, not in affiliation with a recognized political party, so loyalty to any particular party or its practices is not an issue. Fifth, trustees and aldermen hold office for three-year terms. To remain in office another term, each trustee is subject to the polls, which in turn likely makes him or her more responsive and sensitive to matters of concern to their electorate. (9) While all of these reasons are theoretically in harmony with the principles of freedom of information, practically speaking local governments recognize that by the very nature of the types of matters over which they have jurisdiction, they must often operate differently than other levels of government and deal with some types of matters in camera.

Due to the distinct nature of local governments, the passage of MFIPPA in

its current form was disappointing. The brief consultative period was almost an exercise in futility. Consultation on whether FIPPA would apply to municipalities was limited primarily to whether or not there should be one statute or two. The input received from the representatives from local governments was that whether or not there was a combined Act or two separate Acts, the legislation must be tailored to deal specifically with the unique characteristics of local governments. However this advice was largely ignored as evidenced in the fact that MFIPPA only differed in substance from FIPPA in minor ways. While the province created two separate statutes, it failed to make the municipal version specific to the manner in which local governments operate. (10)

On the positive side, MFIPPA may have made most school boards and municipalities focus on the importance of efficient record-keeping and encouraged increased public participation in decision-making at the local level. However, its application to local governments has also created some corresponding administrative and interpretative problems which will be highlighted in more detail in Chapter 7. In general the application of freedom of information legislation to local governments has led to over-formalized responses from overly-cautious public servants. Informal requests for information are likely to meet with such replies as "better to apply under FOI." Such responses may be attributed to the protection given by section 49(2) of the Act from any liability or action for damages resulting from an improper disclosure or non-disclosure. There is clearly more red tape, despite the fact the Act was not designed to interfere with pre-existing means of access to information. The fact that the Act creates numerous examples where discretion must be exercised in the applying of exemptions also creates confusion. Little guidance is given as to the criteria upon which local government officials should exercise their discretion.

The lack of adequate training given to local government institutions has left many municipalities and school boards, particularly smaller ones, uncomfort-

able with their responsibilities under the Act. Hopefully the growing body of Commissioner's Orders and court challenges will provide some authoritative clarification. In addition, provincial funding for local boards could increase the level of confidence of local governments struggling to deal effectively with this legislation.



### **ENDNOTES FOR CHAPTER 3:**

1. The Assessment Act, R.S.O. 1990, Chapter A-31.
2. The Education Act, R.S.O. 1990, Chapter E-2.
3. The Municipal Elections Act, R.S.O. 1990, Chapter M-53.
4. Order P-604.
5. The Office of the Information and Privacy Commissioner/Ontario is located at 80 Bloor St. West, 17th Floor, Toronto, M5S 2V1. The toll-free telephone number of their office is 1-800-387-0073.
6. The first Information and Privacy Commissioner for Ontario was Sidney B. Linden. The current Commissioner is Tom Wright who has two Assistants, namely Tom Mitchinson, for access issues and IPC appeals, and Ann Cavoukian, for privacy matters and IPC compliance. In addition to these officials there are a number of appeals officers hired to facilitate in the mediation of appeals. Within the IPC Toronto office there are a number of other departments inclusive of Strategic Planning and Policy Development, Legal Services, Research Systems, and Communications and Administration.
7. The Precis is a free service.
8. The Office of the Management Board Secretariat, Ontario Cabinet is located at 56 Wellesley St. West, 18th Floor, Toronto, M7A 1Z6. The telephone is (416) 327-2042.
9. From a paper delivered by George H. Rust-D'Eye entitled, "Better Apply under FOI: Getting Information from Municipalities," as presented to the Canadian Bar Association - Ontario, Continuing Legal Education Conference called Hide and Seek: Current Issues in Freedom of Information and Privacy Law, held on Friday March 25th, 1994, pp.4-5.
10. Ibid. p.3.

## **CHAPTER 4:**

### **FREEDOM OF INFORMATION, SCHOOL BOARDS AND THE MEDIA**

It is a well known fact that school board budgets, municipal taxes and mill rates are all intrinsically connected. A large portion of the local taxes collected by municipalities is directed to cover the operating costs of local school boards. Since generally over 50% of property taxes go to school boards, it was anticipated that the new freedom of information legislation would be a potentially valuable tool for journalists to obtain local government-held information on a vast array of subject matters, officials, and educational issues. The question is: has the Act been utilized as such by the media?

Normally we perceive the media as performing a "watch-dog" role over matters of public concern. While the media are not in the regulatory business to ensure compliance with legislation, the media does serve the useful purpose of providing valuable data and news to keep Canadians informed about national and international happenings as well as community issues of local concern. Several school boards have arranged for television coverage of their board meetings, while the rest rely on the presence of newspaper reporters and radio announcers at regular sessions to keep their constituents advised of the decisions of trustees in the expenditure of tax monies.

There were high expectations, and probably some trepidation, by school board administrators that freedom of information legislation would be heavily utilized by the media. The specific concern was that the media's quest to obtain complete coverage of school board decisions about controversial issues would generate the need for more paperwork in a time of reduced staff and resources.

There has been ample time for the media to become accustomed to the process of obtaining information and to take advantage of any benefits in the legislation, especially since the federal legislation came into existence in 1983, followed by the provincial legislation in 1987 and most recently by the legislation relating in part to school boards in 1991. However, to the surprise of many, it would appear that the media has not done so. This chapter will examine some of the possible reasons for the media's lack of use of, or interest in, the Act.

#### **(A) Media Use of the Legislation**

The 1991 statistics produced by the Office of the IPC/Ontario indicate that only 3.7% (or 17) of the total requests of 458 received under FIPPA came from the media. Likewise, there were 394 active municipal appeals received by the Office of the IPC/Ontario in 1991 of which only 6.9% (or 27) were from the media. Both of these statistics reflect a low use of the legislation by communications professionals, or at least a low use of the available appeal process under both Acts when information is denied or refused.

Data prepared by the IPC shows that use by the media of FIPPA for obtaining access to general records of information since the introduction of the legislation in 1987 has declined. While the media initially made 194 requests in 1988, that number dropped to 184 in 1989, then to 163 in 1990 and, finally, to 149 in 1991.<sup>(1)</sup> This decline in use could reflect the media's frustration with the legislation based on experience, or it could be attributed to a combination of other factors to be outlined later in this chapter.

Unfortunately, since only the 1991 and 1992 Annual Reports have been published on the categories of requesters and their corresponding percentage of use under FIPPA and MFIPPA, there is little comparable data regarding the number of or frequency of requests by the media. While the overall percentage

of use by the media is slightly higher at the municipal level at 6.9%, it is still far less than the percentage of use by individuals in general. Overall, far more individuals, businesses and researchers make requests under the provincial and municipal Acts than do representatives of the media.

### **(B) Possible Reasons for the Media's Reluctance**

Commentators have speculated on several possible reasons for the under-utilization of this potentially powerful legislation by the media. Some of the explanations offered are as follows: the daily, weekly, and monthly press deadlines provide little or no opportunity to await responses to access requests; the reporter's perception of the concept of "news"; the business orientation of the media industry; and the nature and attitude of most journalists.(2) Each of these proposed reasons will be briefly examined in the following paragraphs.

#### **(i) The Time Factor:**

Since similar legislation has been in place in the United States for a longer period of time, it may be useful to reflect on the American experience to understand the media's reluctance to utilize this legislation. For example, an investigation conducted by the U.S. House of Representatives Sub-Committee on Government Operations concluded that the mere passage of legislation had not changed the entrenched practices of the bureaucracy. It attributed the news media's lack of utilization of the Act to a "time factor." The media require information quickly in order to meet press deadlines. Since the media have an urgent need for information, the delaying tactics of federal bureaucrats were considered a major deterrent to the more widespread use of the Act. (3) Even with the 1974 amendments to the American legislation which imposed administrative time limits of 10 and 20 working days to respond to requests, the media's use of the revised

Act did not increase.(4) This can possibly be attributed to the journalist's perception that " a delay of information amounts to a denial of information." (5) Reporters facing press deadlines do not have the time to wait for documents to be collected, sometimes from distant field offices of various agencies or boards, and then reviewed, scrutinized and possibly severed, before their final release. Since time is of the essence in providing immediate news of current events, any process which impacts negatively on the timely reporting of news will not be regarded as useful.

#### (ii) The Concept of News

Another significant underlying factor in this phenomenon is what constitutes "news". In general, news can be defined as important events of immediacy capable of holding a reader's interest that have just come to light. Newsworthy events usually concern confrontation or conflict, change, unique or funny items, dramatic events, human interest stories or matters involving prominent people. In most cases the press focuses its attention on timely events. Historical material is only mentioned if it relates to the topic of current interest. "Long-lived social problems remain unreported except under special circumstances." (6) Few reporters have the privilege of writing interpretative news articles or the time to conduct extensive research for in-depth reports. Most journalists spend their time on "hard news", which involves giving an objective, factual account of actual events and occurrences. Coverage of such events would be based on quotations received from "informed sources," but would permit little opportunity to investigate the background of, or to prepare an analysis of, the issues in question.

#### (iii) The Media as Big Business

Newspapers and magazines are big businesses, and, as such, their literary content reflects to some extent what will boost profits and increase circula-

tion. Some issues and events worthy of a high profile in the newspaper or of occupying a large number of columns in a prominent section are reduced in size and located on an inner page because space is needed for advertising, which of course receives priority because it is revenue generating. Recognizing the media as big business may account for the sacrifice it makes in shying away from interpretative, analytical reporting which would rely heavily on informational sources available through the freedom of information legislation. Some commentators have criticized the press for failing to allocate the appropriate financial and staff resources necessary for obtaining high quality, comprehensive reporting of activities, events and issues. Others contend that the media rely heavily on news wire services, like the Associated Press and Canadian Press, which wield awesome power in the reporting of matters and which are designed to provide coverage that appeals to the mass audiences and groups of readerships they serve. The resulting dilemma is that the business aspects of the media industry conflict with the practicality of journalists researching articles which have been based on freedom of information requests.

#### (iv) The Nature of Journalists

Most journalists are generalists, not specialists. This means that they rely heavily on experts for comments, background information and analysis of any complex material. Their reliance on third parties can be attributed to the fact that editors are usually reluctant to publish or broadcast "exclusives" that lack the backing of reliable, authoritative sources. Aside from the obvious time factor in independently researching or requesting information, journalists may be inhibited from using the freedom of information act because they lack the technical expertise necessary to understand and evaluate complex activities of government departments, agencies or institutions without relying on helpful guidance and background briefings from experts. (7)

Traditionally reporters are assigned "beats" where they must remain in the event a story breaks. The underlying idea is to build a network of sources with whom one builds a rapport, and thereby prevent a rival from "scooping" a big story that arises on your beat. Competing reporting agencies often cover the same situation, so journalists must rely on their contacts and intuitive reporting skills to beat their competitors to the presses. That does not leave extra time for filing information requests, and awaiting responses.

#### (v) Journalists' Protection of Sources

There is no guaranteed right to protection of one's sources as a journalist. Nevertheless, the courts have only ordered journalists to reveal sources in certain cases, such as when the identity of the source could not be obtained in any other way, or the identity of the source was considered relevant or beneficial to the proceeding, or there was some other overriding interest.(8) While the courts are careful not to interfere unnecessarily in the relationship between a journalist and his/her source of information, it will not hesitate to do so if there is evidence that he or she has acted in an irresponsible manner as determined by the particular circumstances surrounding the obtaining of the information, the conduct of the journalist, and the degree to which the journalist and his or her superiors ensured the accuracy of the information published.(9)

It is notable that the freedom of information legislation does not protect the notebooks of journalists from disclosure, unlike the section 24 exemption granted to information that is subject to solicitor-client privilege. This means that journalists who rely on confidential sources and informants are not protected, as evidenced by the case of the RCMP seizing the notebook of Ottawa free-lance journalist Jo Ann Gesselin.(10)

#### (vi) The Principle of Freedom of the Press

The principle of freedom of the press is restricted by section 4 of the Official Secrets Act. This section makes recipients of official information (most notably the press, but potentially any public civil servant) guilty of an offence under the Act. Furthermore liability is presumed unless the accused proves the communication to him or her of the information was contrary to his or her desire. In addition, liability is imposed for unlawful retention of documents and for failure to take reasonable care of retained documents. (11) Journalists must also be concerned about attracting personal liability by encouraging other persons to breach a confidence, such as inducing a source to steal information from his or her employer. (12)

The prosecution of the Toronto Sun in 1979 demonstrates the dichotomy between the freedom of the press and open government, and the issue of preserving national security. The case centred around the Sun's inter-office distribution and subsequent publication of disclosures made by M.P. Tom Cossitt in press interviews held outside the House of Commons. The Crown claimed the information revealed was once "secret" and bore directly upon national security. Despite these strong claims, only the newspaper was charged. By way of prosecutorial discretion, Tom Cossitt and CTV, who had utilized this same information in their television report "Inquiry," were not prosecuted. At issue was secret government information relating to suspected Soviet intelligence offices and diplomatic intelligence establishments in Canada. The stories in the press had accused the government of excessive official toleration of these known Soviet espionage activities in Canada. The case raised the questions of what constitutes "secret information" under the Official Secrets Act and whether formerly "secret information" can lose its quality of secrecy through dissemination. The court in its ruling condemned the Act as ambiguous and in need of redrafting and discharged the accused on the basis that the documents were "shop-worn" and no longer subject to the Act as they had already fallen into the public domain.



#### **ENDNOTES FOR CHAPTER 4:**

1. Information and Privacy Commissioner/Ontario. The 1991 Annual Report. Office of the Information and Privacy Commissioner/Ontario, Toronto: 1991. Table 25 at p.63.
2. Bezanson, T., "Why the American Press Make Little of the Freedom of Information Act" Essay in D.C. Rowat, The Right to Know: Essays on Governmental Publicity and Public Access to Information, p.163.
3. U.S. House of Representatives, Freedom of Information and Amendments of 1974 Source Book: Legislative History, Texts and Other Documents , (March 1975) p.8.
4. Bezanson, Op. cit., pp. 166-168.
5. Rowat, D.C., Administrative Secrecy in Developing Countries (New York, Columbia University Press, 1979) p.9.
6. Rochco, B., Newsmaking (Chicago, University of Chicago Press, 1978) p.3.
7. Bezanson, Op. cit., p.179.
8. Robertson, Stuart M., Courts and the Media, Buttersworth, Toronto, 1981, Ch.8. The New Brunswick Supreme Court in the case of Baxter v. CBC and Malling (1978) 122 C.B.R. (2d) 317 refused to order the journalist Eric Malling of CBC to reveal his "source" of information because his source was a document and not a person.
9. Proudfoot, G.F., Law and the Media: Privacy Law and the Media in Canada, Canadian Bar Foundation, Ottawa, 1984, p.47. In the case of British Steel Corp. v. Granada Television Ltd., (1981) 1 All E.R. 417, the court found in favour of the British company which had sued the T.V. producer for breach of confidentiality. The claim was that the T.V. producer had obtained secret and confidential documents, and then refused to tell the plaintiff company how he had secured the documents. However, the court felt the producer 's bad behaviour in the circumstances had resulted in his forfeiture of the law's protection over newspaper sources.
10. Conway, Barry, "The Exemptions in the Freedom of Information Bill," Essay in D.C. Rowat, The Right to Know: Essays on Governmental Publicity and Public Access to Information, p.271.
11. Cohen, Stanley, "Freedom of Information and the Official Secrets Act," p.155.

12. Proudfoot, Op. cit., p.46.

13. Cohen, Op. cit., pp. 158-160.

## **CHAPTER 5:**

### **FREEDOM OF INFORMATION CONCERNS FOR SCHOOL BOARDS**

An analysis of the legislation and the results of the questionnaire reveals a number of issues created by the passage of the freedom of information legislation that have generated, or should generate, concern among school boards in Ontario. This chapter will identify several of the issues that relate to the application and implementation of the Act in the school environment. The issues have been categorized according to the stakeholder groups most affected, namely the students, the staff and the school trustees. This chapter will highlight some of the practical concerns, both real and potential, created by the legislation. It is not an exhaustive study of all the concerns, but rather illustrates that many practical implications for school boards were either overlooked or not fully contemplated at the time the Act was passed. The fact that some of these issues were drawn from the survey of school boards supports the hypothesis that this legislation is not suitable in its present form for application to school boards.

#### **(A) Students:**

Educators recognize that their primary objective is to teach students creatively and effectively the curriculum as established by the Ministry of Education. To monitor this, the Education Act and Ministry Guidelines and Provincial Regulations have set out in detail requirements for maintaining accurate records of a student's academic progress. Within the Ontario school system these records are known as the "Ontario Student Records" (hereinafter referred to as O.S.R.s).

Formerly Ontario Regulation 298 stipulated what was to be kept in the O.S.R., and how long these documents were to be retained. The Ministry Guidelines also specify a lengthy retention period, obliging boards to maintain these educational records for as long as 55 years.

Communication between schools and pupils age 16-18 has raised concern for school boards in general. The concern stems from an ambiguity in the legislation governing education and freedom of information. Currently, neither act has been amended to indicate which act prevails. Section 266 of the Education Act (1) sets out who is entitled to have access to the pupil records, namely, the pupil, the parent/guardian of a minor student (those under age 18) and certain administrative personnel who are aiding the student's academic development. The operative words in this section are "access" (but not copies) and "pupils under 18 years of age." Unfortunately this terminology raises two dilemmas. The first issue concerns the practice that school boards have traditionally only granted "access" to the contents of the O.S.R., but now the freedom of information legislation requires that "copies" of personal information be made available, along with "access" to the original record. (2) The second concern is that there appears to be a conflict between the two acts with regard to the age at which disclosure of educational records is permitted. While s. 54(c) of MFIPPA provides that an individual's rights or powers under the Act may be exercised by a person who has custody of the individual where the individual is less than sixteen (16) years of age, s. 266 of the Education Act permits access to parents and guardians of minor students who are less than 18 years of age.

In a practical context this raises a number of problems. For example, at the secondary school level, students who turn age 16 are no longer required to be in school. These students, who are by law still minors, can also legally withdraw from the custody or control of their parents, and upon establishing an independent living status, obtain social assistance. Students who have elected to

withdraw from parental control often request that their school records, and specifically their report cards, not be forwarded to, or shared with, their parents. While traditionally the report cards are sent home for their parents' signatures, this situation poses a moral and legal dilemma for principals. Good educational practice requires the involvement of parents in discussions regarding their children's achievement, attendance and behaviour, especially in situations where diminishing attendance is an early sign of pupil dropout. However, it would appear that school communications with parents of senior students without their consent could potentially violate the freedom of information legislation. Does the school comply with the provisions in the Education Act and share the contents of the O.S.R. with parents until the student reaches age 18, or does the school comply with the provisions in MFIPPA and require that disclosure of such personal information necessitates the written permission of any student over age 16 years of age?

To complicate matters further, if a school was to honour the pupil's request not to disclose, it could be indirectly jeopardizing the rights of other interested parties as set out in other legislation. For example, where the student was in the custody of one parent, the non-custodial parent usually has access rights and support obligations. Therefore, the non-custodial parent would have a legitimate interest in confirming his or her child's continuous enrollment as either a full-time or part-time student, as well as the student's academic progress up to age 18, due to the fact that many court orders for support are contingent upon such factors. Interestingly, the Divorce Act (3), and the Children's Law Reform Act (4) both define "access" rights as including all information relating to the health, welfare and education of the child. But this still leaves the practical problem of dealing with step-parents and common-law spouses who request access to the educational records of those students with whom they have a relationship. The legislation fails to provide guidance regarding dealing with the extended family, and

leaves it to the principals as "chief custodians" of the O.S.R.s to determine how best to handle these often emotionally charged situations. The disparity between the two acts in terms of age at which consent is required also does not address "special needs" pupils, who may have physically attained the age of 16 or 18, but not be mature enough mentally to understand the implications of granting consent to their personal information.

Another issue of interest to students is their right to obtain examination and test questions. Students could argue that their test papers, answers and overall standing are their own personal information to which they are entitled to have access, whether for the purpose of questioning a given score or grade, or for future study purposes. While s. 11(h) of MFIPPA provides that access to the answers of an examination or test is permissible (but not mandatory), it does not require that the actual question be released.

Preserving the privacy of each student's answers is also an issue. In the classroom context, teachers often elect to return the entire examination or test to students, or to take up the exam questions in the class. However, since the students' tests are viewed as personal information, the practice of having other students or paid staff or volunteers act as the "markers" would appear to be a violation of the Act. It is questionable whether schools should continue any of the above practices since they are granting access to personal information to a third party without the written consent of the pupil to whom it pertains.

**(B) Staff:**

This legislation has created a number of interesting issues for the Human Resources departments of school boards. The establishment of competition files, the checking of references, the disclosure of salaries and job classifications, and the investigation of grievances are but a few of the access and privacy issues that impact on school board employees.

If a school board advertises to fill a job vacancy then it is soliciting applications and résumés. Any documents obtained from applicants in the competition are subject to the provisions of the Act with respect to the collection, retention, use, disclosure and access to information. This means the school board must notify candidates of its statutory authority to collect this personal information for recruitment and staffing purposes, and indicate who the applicants can contact if they have any questions.(5) Subsequently the candidates have the right to access their own evaluation and rating by the selection board, and even possibly the competition, evaluation and rating documentation of other candidates (usually the successful candidate), if such access does not constitute an unjustified invasion of personal privacy. This test usually precludes revealing résumés and applications of other individuals or any information that would indirectly identify them. Furthermore, any decision by a school board to release such personal information to another individual would require notice being given to the affected parties so that they are provided an opportunity to make representations on why it should not be disclosed.

While competition files for job vacancies constitute a collection of information subject to the requirements of the Act, any unsolicited résumés and applications do not have to be retained. For most boards this routinely occurs when new teacher graduates seeking employment send résumés to school boards across the province each year. Many boards have responded to this influx of mail by simply discarding all unsolicited applications. This avoids the legislative requirement to retain it for one year, as well as the time and economic costs of responding to those persons seeking employment when there are no jobs available. (6)

In regard to reference checking, the legislation has also imposed new requirements. It is advisable that the written consent of the candidate be obtained at the application or interview stages of the selection process. Such a

consent would grant authorization to a school board to contact and to obtain information from past or present employers. This consent will enable the board to access job-related information on each candidate, inclusive of the educational history, employment history, work performance and rate of absenteeism.

The legislation not only requires consent to check references; it also requires institutions to retain the information acquired from a reference check in the competition file. While applicants may request access to information obtained in a reference check, a board can refuse to disclose evaluative or opinion material compiled for the purposes of determining suitability, eligibility or qualification for employment where the individual who provided the information has requested confidentiality.<sup>(7)</sup> However, the Act appears flawed in several ways in regard to reference checking. First, this is a discretionary exemption to disclosure, which means that any refusal to disclose information obtained from a former employer to a disgruntled unsuccessful candidate could be challenged by way of a freedom of information appeal request. That in itself could be a time-consuming and costly process for the school board. Second, it presumes that the former employer is familiar with this complex legislation and is specifically aware of the provision of the legislation that allows a claim for confidentiality. Third, the Act makes it mandatory for institutions to maintain even more paper in files they are statutorily obliged to retain on persons who are not even their employees.

Human resource personnel have been compelled to reorganize their files in order to comply with the legislation. Certain medical information, such as long-term disability records, workers' compensation claims, diagnostic and prognostic medical information and pre-employment medicals must be kept in a separate file for each employee apart from his or her general employment history, attendance and payroll information file.

Many individuals would presume that while their employment responsibili-



ties may be a matter of public knowledge, their remuneration is personal information. However, for both new and existing employees the legislation provides for the disclosure of job descriptions, job position classification and organizational information (such as the justification factors and reasons for placement on the salary grid), salary range and benefits and the standards against which the position was compared or evaluated. (8) Disclosure about both current and former employees of a school board is permissible under the Act. In addition access to such information is available to employees as well as external requesters. The Act even allows for the financial details of a contract for services to be disclosed without constituting a violation of privacy. (9)

Section 11 of the Act permits a discretionary exemption prohibiting access to information about any proposed re-organization plans or policies that involve the management of personnel or the administration of an institution that have not yet been put into operation or been made public. This exemption would at least temporarily allow for non-disclosure of proposed down-sizing plans, whether they be negotiated or imposed. Once the plans are finalized, the public would have a right to access such information.

The complexity of the legislation is clearly evident in the area of staff relations. Since the majority of school board employees are unionized or are members of teacher federations, access to information retained on grievance proceedings or investigations in discipline and termination matters, are of a critical nature to board staff. The legislation governs how information on staff relations can be collected, and when the employees must be notified of its existence, and whether or not the information is accessible by the staff members or even by others. The freedom of information legislation makes several references to courts and quasi-judicial tribunals. (10) These provisions allow for the indirect collection of personal information by a school board from other sources without the consent of the individual who is the subject of the grievance or investigation. This exemp-

tion applies whether or not subsequent hearings or judicial proceedings eventually take place. While the Act allows for the indirect collection of personal information without an individual's consent, once the information is obtained, the school board is obliged, save and except for law enforcement matters where a criminal investigation is taking place, to notify the individual in writing that such information has been collected. Naturally, once notified, the individual can challenge such a collection.

In the grievance process there is usually an abundance of documentation, much of which is shared with the grievors or their representative. Since access to information compiled on an individual is a presumed right under section 36 of the Act, the issue of access to case preparation material arises. The Act states that such material must be disclosed unless it falls under an exemption, such as solicitor-client privilege or advice or recommendations to government. The latter exemption would extend to such records as how to proceed with a discipline or a grievance, the witnesses that should be called, and potential strategies or precedents to use. However, these exemptions are only discretionary, not mandatory. Since the terminology "advice and recommendations" would usually refer to formal courses of action, it would still allow access to transcripts of interviews with potential witnesses. In addition, these exemptions to right of access have no application if a board is required to produce documentary evidence pursuant to rules of a court or tribunal in accordance with section 51 of the Act.

**(C) School Board Trustees:**

School trustees are acutely aware that there is a public expectation of government efficiency and cost restraint. Those in the public sector, like school boards, must operate within a framework of fiscal responsibility. To ensure this happens, watch-dog organizations like the Taxpayers' Coalition have emerged. In order for the public to determine if that economic objective has been met, they

require information from an open government. From that perspective the MFIPPA legislation appears to be a necessary tool. But what constitutes local government being really "open"? For example, a school board's ultimate decision to buy a certain product or book must be made in open session to be a legitimate decision, but there is no information provided about other books or products considered and subsequently rejected.

An "access to information" issue of interest to trustees concerns the public's right of access to the minutes of such meetings referred to in various ways as "trustee retreats," or "informational sessions" or "strategic planning sessions" or "caucus meetings." While school boards routinely hold in-camera sessions prior to the commencement of their regular board meeting, such meetings, without the presence of the public, are restricted to certain types of agenda items. The Education Act (11) and board bylaws (12) both permit the exclusion of the public from board discussions that relate to matters of property, personnel or litigation. In contrast, caucus meetings are informal gatherings of trustees where no formal decisions are made. However, often contentious issues are discussed at these caucus sessions, the particulars of which are outside the scrutiny of the public's notice or knowledge. Many trustees would argue that the value of such sessions is that they provide an open airing of differences, and an opportunity to build unity on contentious issues. Others may debate the political correctness of such views on the basis that the public's opportunity to provide input into the decision-making process is undermined by such creative terminology in reference to meetings of elected officials. Even though these meetings are closed to the public, minutes are usually taken of the proceedings. This raises a secondary question of whether the new legislation grants to anyone who later requests a copy of such minutes the ability to obtain a copy of minutes of a meeting from which he or she was intentionally excluded.

The issue of whether a "retreat" constitutes informal discussions that may

be held "in camera" or a meeting which must be held in public was the subject of a judicial review application in Southam Inc., Eade and Aubrey v. Council of the Corp. of the City of Ottawa and Corp. of the City of Ottawa. (13) The facts in that case were that the city council members, along with several staff members, held a two-day retreat at a resort. On the agenda were many items that were within the scope of matters normally dealt with by council. For example, there was a detailed structured agenda for the retreat that included such matters as an overview of a capital expenditure plan, a consideration of an infrastructure management salary, a review of priorities for the next three years, and a consideration of additional salaries for councillors who were committee heads.

At page 731 of the decision, the Ontario Divisional Court states that the pivotal question in the case was whether the councillors attended a function at which matters ordinarily constituting council's business were dealt with in such a way as to move the matters materially forward in the overall spectrum of a council decision. In other words, was the public deprived of the opportunity to observe a material part of the decision-making process?

The court found the retreat was a meeting at which the public should have been allowed to be present. Furthermore, it was not relevant that the retreat did not substitute for a regularly scheduled meeting or that it was held informally without the usual ritual trappings of a council meeting.

The Southam decision indicates it may be necessary to devise an appropriate exemption for certain aspects of school board meetings which are held in closed sessions. In the meantime trustees could preclude the public's right of access to such minutes by calling the sessions "committees of the whole" and then rely upon the board bylaws to allow them to conduct such meetings in closed session. Alternatively, the "brain-storming sessions" could be done in small sub-groups and not as a collective body. However, these proposals to avoid the application of the legislation appear to undermine the intended purpose

of the legislation, and to be inconsistent with several of the administrative values as set out in the value framework.

The unsuitability of this legislation for local government is also exemplified in other ways. For example, the two exemptions under the Act, namely section 12 (cabinet records) and section 13 (advice to government) were drafted to apply to provincial ministries and agencies, and have no relevance to school boards.

As the above examples for students, staff and trustees illustrate, modifications are required to make the Act more appropriate to the operational context of school boards. It is hoped that this will be achieved by amendments to the legislation that reflect concerns raised by school boards in the three year legislative review process mandated by section 55 of the Act.

## **ENDNOTES TO CHAPTER 5**

1. See Appendix F for the wording found in section 266 of the Education Act R.S.O. 1990 Chapter E-2, as amended, governing pupil records.
2. Section 23 of MFIPPA states that a person who is given access to all or part of a record shall be given a copy, and also an opportunity to examine the original record upon request.
3. See Appendix G for the wording found in section 16 of the Divorce Act .S.C. 1985, Chapter 3 (Second Supplement).
4. See Appendix H for the wording found in section 22 of the Children's Law Reform Act R.S.O., 1990 Chapter C.12.
5. This requirement as set out in section 29(2) of MFIPPA applies to any personal information which is collected on behalf of an institution about an individual.
6. Section 30 of MFIPPA refers to the retention period prescribed by regulation. Section 5 of Ontario Regulation 823 states that the retention of personal information is required for the shorter on one year after use or the period set out in the institution's bylaws, unless the individual to whom the information relates consents to its earlier disposal.
7. See section 38(c) of MFIPPA.

8. Section 14(4)(a) of MFIPPA states that "Disclosure does not constitute an unjustifiable invasion of personal privacy if it discloses the classification, salary range and benefits or employment responsibilities of an individual who is or was an officer or employee of an institution."

9. See section 14(4)(b) of MFIPPA.

10. See sections 32(1)(f) & (g) and 51 of MFIPPA.

11. See section 207 of the Education Act R.S.O. 1990, Chapter E.-2, as found in Appendix I.

12. The Lincoln County Board of Education's Bylaws provide in Bylaw B-9 and B-10 which meetings of the committees of the board shall not be open to the public, and specifically the types of matters which may be considered in private session, and which are not to be raised in regular open meetings of the Board.

13. See Appendix J for a copy of the Southam decision, which is reported at 5 O.R. (3d) at p.726.

## **CHAPTER 6:**

### **OVERVIEW OF THE COMMISSIONER'S ORDERS INVOLVING SCHOOL BOARDS**

While the purpose of the freedom of information legislation was not to interrupt the normal business practices and exchange of information between requester and institution, it has made school boards uncomfortable about when and what to release to whom. The Commissioner's statistics reveal that in 1992 42 appeals were received by the FOI Commissioner involving school boards with 8 of these resulting in Orders being issued in 1992. From January to December of 1993 there were 35 further Orders that specifically involved school boards. Apart from the FOI Orders, there were also 6 Privacy Investigations conducted on school boards and reported in 1992. In the first two months of 1994 there were an additional five Orders issued to school boards. This means that during the time frame of January 1991 until February 7th, 1994 there has been a total of 48 Orders issued to Ontario school boards by the Office of the IPC/Ontario. While these numbers may not seem large in light of there being 164 school boards in the province of Ontario, (1) it does reveal the collective uncertainty among boards of education about the application of this relatively new legislation to some very practical situations affecting their programs, policies and personnel.

Due to the commonality in issues and decisions affecting school boards, the Commissioner's Orders have tremendous implications for other boards' operations, including those that have not yet been the recipient of an "Order." On that basis, a review of the school board cases generating Orders will be of assistance in determining a number of issues, such as assessing what sections of the Act cause the greatest concerns to school boards; and what sections are relied



upon extensively to justify both the request and the board's reluctance to disclose. In addition to the "Orders" pertaining to school boards, mention will also be made of any investigative decisions involving school boards or their staff or programs.

In reviewing the cases, reference was made to the original complete Orders (2), as well as the summaries of the appeal orders, as published in the IPC Newsletter. Unfortunately the analysis of the cases, even when reviewed in their entirety, is hampered by the fact, that, unlike judicial decisions, the appellant is never identified either by name or even more generally as an individual, media representative, or business organization. In addition, no factual outline on why the information is desired by the appellant is provided, or reasons given as to why the appellant under the Act should be entitled to this record, document or information, despite the Head's objections. Instead the onus of proof lies with the Head of the organization to provide "evidence" for its reliance on any section of the Act, creating a bias in favour of the appellant, whose motives or plans for utilizing the information never seem to be in question.

For the convenience of the reader each of the Orders has been summarized and chronologically listed in Charts 1, 2, 3 and 4 and can be referenced as Appendix K, L, M, and N respectively. (3) In addition, each of the forty-six Orders and a few of the investigative decisions involving school boards will now be examined in greater detail in the following paragraphs for the purpose of highlighting some of the issues school boards face when complying with this legislation.

#### **(A) Legal Opinions (Section 12)**

The common law solicitor-client privilege has been deemed a valid defence for school boards to rely upon in refusing requests for release of infor-

mation. The Wentworth County Board of Education (4) was asked to release a copy of a lawyer's reply concerning the validity of noon hour Bible clubs in the county. The institution denied access to the record on the basis of section 12 of the Act which states a board "may refuse to disclose a record that is subject to solicitor client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation."

The appellant raised the issue of a "compelling public interest" in reference to section 16 of the Act to seek access to the legal opinion. While section 16 of the Act allows for a compelling public interest to override a non-disclosure, and thereby to permit its release, it does not mention overriding the solicitor-client privilege in section 12 of the Act. However, compelling public interest could be used to obtain release of an employee's advice or recommendation for such things as a survey or report (section 7); or information the institution has received in confidence from other levels of government (section 9); or third party information (section 10) or records of an economic interest (section 11); or information that normally would seriously threaten the safety or health of an individual (section 13); or personal privacy information (section 14).

Therefore, the head's decision was upheld on the basis that advice was supplied to the institution in a confidential written communication which was directly related to seeking, formulating or giving legal advice, and section 16 was not applicable to matters concerning solicitor-client privilege. This Order distinguished between a lawyer citing mere legal concerns or notes of interest and held that comments about legal matters are not equivalent to offering legal advice or making recommendations of a legal nature.

The issue of whether a legal account fell under the protection of solicitor-client privilege has also been decided in the case involving the Board of Education for the Borough of East York. (5) In general it was found that in order

to gain the protection of the legislation a specific course of legal action or options must be offered for deliberation or legal analysis. The legal account itself citing the services rendered is not protected by this exemption.

The original request was for records respecting the payment of honoraria to board trustees. While the board granted access to some documentation, it denied access to other records on the basis of section 12 - solicitor-client privilege. Upon receiving information about the size of the legal account paid to obtain legal advice in order to respond to the FOI request on the subject of honoraria, the appellant sought further disclosure. The sole issue in the appeal was whether the discretionary exemption provided by section 12 of the Act applied to the legal account.

The board contended the legal account was a confidential communication between the board and its solicitors because it set out the names of individuals with whom the board's solicitors discussed certain aspects of this particular case and rendered legal advice. The appellant argued that a solicitor's account should be contrasted with a legal opinion or legal advice which is covered by privilege. A legal account is a mere tally of work done, hours spent and fees generated, and not a method of transmitting legal advice to a client. In addition the dollar amount of a legal account is an insufficient means of letting the public see how their public funds were expended.

On appeal, the inquiry officer supported the narrower interpretation of solicitor client privilege and ordered the board to disclose the legal account since it contained no legal advice, opinion, recommendations or strategy. At page 6 of his decision, Assistant Commissioner Irwin Glasberg wrote, "I also believe that the intent of the legislation would be ill-served by allowing the section 12 exemption to be used to shield a non-substantive record of this nature from legitimate public scrutiny. That result would be particularly unfortunate in the current recessionary climate which places an unparalleled obligation on officials at all levels of

government to ensure that tax dollars are spent wisely.”

Since legal advice is not defined in the Act, the Order also made reference to previous rulings which dealt with this same issue. To meet the definition of legal advice, it must include a lawyer’s legal opinion about a legal issue, along with a recommended course of action, based on legal considerations, regarding a matter with legal implications.

### **(B) Salary Ranges of Officials and Employees**

The same reliance on "public interest" was raised in the Lambton County Board of Education (6) decision in which the appellant requested access to the actual salaries or salary ranges for the board's Director of Education, Executive Assistant and the Superintendents. In granting the request, the Commissioner indicated in his reasoning that the operation of the public institutions should be open to public scrutiny and that the public has the right to know how public funds are being spent, especially in the current economic environment. While disclosure of the exact salaries was not necessary or permissible because of the unjustified invasion of personal privacy as set out in section 14 (3)(f), it was in the public interest to know the salary ranges of public employees. Interestingly the Order went on to require the board, where no salary ranges existed, to prepare a salary range for the position and then disclose it.

### **(C) Salary Projections**

While salary ranges can be disclosed, the release of salary projections is a different matter. School boards provide such confidential data as salary projections to the Ministry of Education in the board's annual budget estimates when seeking provincial funding. Such estimates often include projections for salary

increases that have not yet been negotiated. To avoid such information becoming accessible to third parties, such as teachers' federations, the three-part test in section 10 of the Act must be complied with in regards to labour relations information. When submitting the estimates to the province, school boards should explicitly state that the salary projection and other sensitive information are being supplied in confidence with the expectation that the Ministry will treat the information as confidential to avoid any prejudice to future or ongoing negotiations or any potential financial loss, according to section 17 of the provincial freedom of information legislation by which the minister is bound.

#### **(D) Third Party Information**

School boards have been reluctant to release information supplied to them by a third party. Under the freedom of information legislation an institution must notify any third parties who have an interest in or an indirect ownership of the information in question now being requested for release. The section 10 provision of the legislation has been the subject of a few cases concerning school boards, and will most likely be raised in several more.

The Halton Board of Education and Apple Canada Inc. (7) had negotiated a joint proposal to develop an advanced technology secondary school. The Board claimed it was a trade secret under section 10(1)(a) belonging to a third party and denied access to the requester. However, the Office of the IPC/Ontario ordered disclosure of the four-page record and letter of intent, which outlined the conceptual framework of the potential project, on the basis the information in the record did not qualify as a trade secret. Reference was made to the American judicial definition of this term, along with the various meanings generated by the courts in several Canadian provinces. The Canadian version of "trade secret" was eventually adopted by the Commissioner. The Inquiry Officer

decided the connection between the proposal and the commercial activities of the computer company were too remote to qualify the information as commercial in nature, for which disclosure would result in some prejudice to its competitive position or economic loss. In addition, the record in question arose from negotiations with the school board, so it was difficult to distinguish what, if any, information was "supplied" by Apple Canada, as opposed to the school board, in order to claim the section 10 exemption.

One of the problems with this decision is that the legislation was intended to apply only to government institutions, not private enterprises. However by vicariously requiring corporations like Apple Canada to comply with the Act, the IPC could be interfering with and discouraging future educational ventures between school boards and private companies. Some companies may be reluctant to be subjected to the disclosure provisions of this legislation if it could potentially affect their ability to compete in the open market.

The Commission has also ruled that simply because information is purchased by a school board from another source does not necessarily make it commercial information for the purposes of the protection afforded by section 10 of the Act. This was the case in the Etobicoke Board of Education (8), which refused under section 10 of the Act to release a staff report on poverty in Etobicoke which included population and income forecast information purchased by the board from a third party research company. According to the Commissioner's office, since the report in question did not contain the population and income forecasting formulas or models themselves, there was no concern of a "trade secret" being disclosed by the release of the staff report containing the third party information. Neither was there any technical, scientific or financial information contained within the report itself.

Satisfying all elements of the three-part test found in section 10 was raised in the case involving the Timiskaming Board of Education. (9) The board

had retained a management services company to manage its custodial and maintenance departments. The company, known as ServiceMaster of Canada Limited, had entered into a contract with the board, and objected to the terms of the contract being disclosed on the basis it contained personal information about employees that should not be released. Upon review of the contract, the Commission rejected this section 21 argument because there was no recorded information about any identifiable individual, rather it just referred to the employees collectively. Likewise the Inquiry Officer found that the section 10 tests were not met because the information was not supplied by ServiceMaster to the board, rather it had been extensively negotiated. This conclusion was based on the fact the contract contained a clause stating the agreement had been negotiated and prepared by the parties equally and should not be construed as having been drafted by one party.

The above rulings can be contrasted with the decision rendered in the Halton Board of Education case (10), where the third party suppliers were able to satisfy the IPC that records describing the agreements and relationship between the school board and the suppliers of computer hardware and software for use in a new secondary school would result in financial loss to them if disclosed. The third party suppliers had objected to disclosure based on s.10 of the Act, which requires satisfying a 3-part test. The Commissioner accepted that the information relating to sale and purchase prices for computer equipment was "commercial information", which by affidavits from the Board and suppliers was attested to as "supplied in confidence" and that disclosure would "significantly prejudice their competitive position" in the educational marketplace, by the release of pricing and marketing data to competitors. While the suppliers were successful in convincing the IPC not to disclose the requested information, it illustrates that even parties not governed by the legislation can be subject to the effects of the legislation. In order to satisfy the Commission third parties must become knowl-

edgeable about the Act, its provisions, exemptions, appeal process and case law. In response to a request for information they are put on the defensive, obliged to prove by affidavit evidence that their records qualify for the protection offered under the Act.

Access to other financial information supplied by the government has also been the subject of an appeal. A northern Ontario board (11) received a FOI request for disclosure of the monies received by one board with respect to the amalgamation of two school boards. The record at issue was a letter to the board from the Assistant Deputy Minister of Education enclosing the Ministry's contribution toward the transition costs arising out of the amalgamation. The board objected to its release on the basis it would prejudice labour negotiations. Upon appeal the Commission ordered the disclosure of the record because the board failed to show that all elements of any mandatory or discretionary exemption had been met. Even though it was information received from the government of Ontario, the second element of section nine's two-part test was not met because the Ministry did not take any position as to the confidentiality of the record. Likewise the board failed to show the financial information was supplied "in confidence" under the three-part test found in section 10 of the Act.

Lastly, the board failed in its bid to claim a section 11 discretionary exemption when it did not provide sufficient detailed and convincing evidence to establish a clear and direct linkage between disclosure of the record and the suggested harm. Under section 11 the board is obliged to show what specific use or misuse of the information would reasonably result in prejudice or harm the board's financial or economic interests or its competitive position. While all parties share the burden of proving the applicability of any exemption, the institution bears the burden to prove that a record, or any part thereof, falls within one of the specified exemptions.



### **(E) Educational Testing**

School boards across the province routinely evaluate and test their students for a range of exceptionalities from that of giftedness to learning disabilities. In accordance with the Education Act,<sup>(12)</sup> school boards are authorized to employ psychologists who can administer these tests for determining student placement, and program eligibility. Since standardized tests are used, only limited information can be provided to the students and parents about the results. An actual review of the test questions and student's answers are not permitted, because the test is purchased from a third party and the same test is used repeatedly on hundreds of students. Any release of the questions, or the student's correct answers, could potentially jeopardize the reliability of the results, or any future use of the test protocol itself on other students.

In a case involving the Lincoln County Board of Education (13), a parent was unhappy with a psychologist's determination that their child was not "gifted." In an effort to see their daughter's test, a freedom of information request was made to the board, which refused access on the grounds that it was a test purchased from a third party (section 10) and there was a discretionary exemption permitted in the legislation for examination questions under section 11(h). The test administered to the student was known as the Stanford Binet Intelligence Scale, the same test used by the majority of other boards. The test itself is only revised every 10-20 years, so maintaining confidentiality with respect to its contents is integral to maintaining its validity as a testing procedure. Its only competitor on the market is known as the Weschler Intelligence Scale for Children, also a standardized test. Regardless of which test was used by a school board, the IPC ruling would apply, so there was much at stake in this decision. Written submissions were received from the school board, the third party Canadian distributor of the test, Nelson Canada, and the appellant. Nelson Canada claimed section 10 rights on the basis that the test constituted a trade secret, for which

any disclosure could result in economic or commercial loss.

Fifteen months after the notice of appeal was first sent to the board, the IPC rendered its two-part decision. Release of a one-page creativity test designed by Lincoln was ordered to be disclosed. However, a severed copy of the fourteen pages used by the student in the Stanford-Binet test booklet was also ordered to be released. The severed portions ordered to be released consisted of the student's answers and the overall test scoring page as calculated by the evaluator. The Order was not complied with, and judicial review of the decision was sought, and is still pending. (14) The board's concern was that the tribunal had failed to see the connection between the release of the student's correct answers in sequential order and the actual test questions themselves, especially in the vocabulary section and the absurdities section.(15)

A further appeal involving a school board dealt with the institution's decision not to identify each school by name when releasing information on cross-curriculum educational testing conducted by the board. The appellant specifically requested information from the Carleton Board of Education(16) showing the standings of each of the board's schools in provincial reviews for Grade 11 & 12 physics and chemistry, and Grade 9 geography, and the results, both school-by-school and board-wide, of all system-wide tests given since 1983 in English, Mathematics and Science for Grades 9 thru OAC. While the board consented to the release of the requested information, it identified each school by an alphabetical code designation and not the school name, and did not provide a legend explaining the code.

On appeal the Information and Privacy Commissioner subsequently ordered the disclosure of the school names on the basis that school names were not personal information of any identifiable individual, and there was no prejudice to the economic or competitive position of the school board as required in section 10(c) of the Act.

This decision completely overlooked the practical concern that some schools which performed poorly on the testing may be unfairly labeled as inferior educational institutions, when the test results are examined in isolation from other factors. In other words, the fact that the efficiency of the school principal or teaching staff could be discerned, or an unfair judgment made on the academic profile of the student population at individual schools, did not make the information "personal."

**(F) Personal Information about Students, Staff and Volunteers (Sections 2 and 14)**

Information about a student's health, welfare and academic progress is strictly guarded by school boards from disclosure to any one other than those permitted access under the Education Act. (17) Following a stone-throwing incident at one of their Brampton schools, Dufferin Peel Roman Catholic Separate School Board (18) was faced with a request from a parent seeking access to the name and address of the child who allegedly threw the stone and the names of the children who witnessed the incident. The school board denied the parent access to such information claiming it was personal information under the protection of section 14 of the Act.

In his ruling, Assistant Commissioner Mitchinson distinguished between the release of the name of the child who allegedly threw the stone and his agreement with the board not to release the names of the potential witnesses. The IPC ordered the board to release to the appellant the former name to allow a fair determination of rights in accordance with section 14(2)(d) of the Act, specifically in order to add the child as a party to an existing civil action, but this same test did not apply to the names of the witnesses.

This ruling could be applied to many scenarios within a school, whether it is a shop or gymnasium accident, or a student fight on the playground. Such

events are usually handled internally through student suspensions or expulsion proceedings in a confidential manner as provided by the Education Act.(19)

The issue of disclosing the names of volunteers at a school board was also considered by the IPC. The Head of the Halton Board of Education (20) was ordered to disclose the names of the persons identified as "Key Communicators" for the board, along with their correspondence, expense accounts and the questionnaires/surveys developed by them, because the section 14 personal information exemption was deemed not to apply to them. In this case the IPC decided the disclosure was a justifiable invasion of personal privacy because it was desirable that members of the public have access to this information for the purpose of subjecting the activities of the institution to public scrutiny. The board had refused access to the names of the volunteers on the basis that when initially recruited for the program they were not informed their involvement would become public knowledge.

While not a school board case, the decision involving the Regional Municipality of Sudbury (21) would still apply to school boards compelling them to release the names of all temporary and part-time employees.

A school teacher was also successful in securing the names of two complainants who had written two letters to his Principal and Supervisory Officer complaining about the teacher's conduct.(22) The teacher complained that the letters were used against him without his knowing the contents or names of the accusers, resulting in the Northern District School Area Board relocating him to another school 650 km. away. The IPC held that an individual's right of access to his own personal information was not an absolute right, if the release of the information would constitute an unjustified invasion of another individual's personal privacy. In reviewing the facts in this case, the IPC held that there was no evidence the case met any of the exemptions set out in section 14. Therefore, the release of the letters was ordered, with only the addresses and telephone num-

bers of the complainants deleted. It is interesting to note that the IPC ordered the release of the requested information, despite the fact the teacher had alternative rights to disclosure through the grievance process.

This decision can be contrasted with the ruling in the Hornepayne Board of Education case(23), which also considered the definition of personal information. The appeal arose when the school board denied the requester access to two letters sent to the Chair alleging the requester treated someone unfairly. The Commission held that the requested material did constitute personal information since it concerned correspondence or views and opinions of another individual about the requester. However, based on the guiding principles found in section 14 of the Act, the Commission ruled the discretionary exemption found in section 38(b) did not apply to the situation. The Commission examined the contents of the two letters and, in light of the criteria in section 14 of the Act, found that the right of access to the requester's own personal information outweighed the rights of the authors of these letters to the protection of their privacy. In ordering the release of the documents the Commission reaffirmed that the onus is on the holder of information, not the requester, to prove that the disclosure of the personal information would constitute an unjustified invasion of the personal privacy of another individual.

While the Sudbury, Hornepayne and Northern District decisions stand for the proposition that the names of employees and complainants can be released, access to other personal information such as phone numbers and educational qualifications have not been viewed the same way. The Wellington County Board of Education's decision (24) not to release the phone numbers of permanent or regularly employed federation members to their own OSSTF President was upheld by the IPC. The Commission agreed that the phone numbers were personal information, and disclosure would constitute an unjustified invasion of personal privacy. The Commission may also have considered the fact that a

union or federation has alternative methods of voluntarily securing the same information from its membership, rather than relying on the boards as the source.

This same reasoning was applied in the Cochrane, Iroquois Falls, Black River-Matheson District Roman Catholic Separate School Board decision (25) which was rendered only one day after the Wellington decision. In that case the board was asked by the parents of a special needs child for access to the educational qualifications of the teacher's aide who had been hired to assist the child in the classroom. The IPC upheld the board's decision not to disclose personal information about an individual's employment history or educational background, due to the fact it was an unjustified invasion of personal privacy.

In another case the natural father of a student under age 16 requested from the Windsor Board of Education (26) the list of the individuals and phone numbers the school was to contact in an emergency. When the mother, daughter and new husband all refused to consent to such disclosure, the board denied access relying upon s.14 of the Act. The IPC then upheld the board's decision not to release the names and phone numbers pursuant to s.14, but also made reference to s.54(c) of the Act which states that the person with "lawful custody" of a person under age 16 can seek access to information on his or her behalf. However, under the terms of the divorce the father had not been granted custody, so he could not rely upon s.54 to obtain the emergency phone numbers. While the IPC may have recognized the potential for using the FOI legislation to obtain material not otherwise readily available in litigious and family-related matters it is not mentioned in the written decision. They may also have considered the fact that individuals often elect to pay the additional cost of having their phone numbers "unlisted" for any number of privacy and security reasons and were reluctant to see the Act become a means to interfere with this privilege.

A school board was the recipient of a request for information about a deceased person formerly in their employ. A solicitor acting on behalf of the

executrix of her husband's estate requested under the Act access to certain records held by the Welland County Roman Catholic Separate School Board(27) pertaining to the deceased man. In accordance with a signed authorization the board willingly provided the requester with copies of the board's policies and protocol and the deceased's employment file, because it was information concerning entitlement to death benefits, insurance matters and vacation pay, all of which is accessible under section 54 of the Act to someone who is administering the estate. However, the board relying upon sections 6 and 38 of the Act, denied access to records of board minutes where the deceased was discussed or any documents concerning allegations, investigation or charges about the deceased's alleged criminal conduct. In addition the board contended that certain records did not relate to the administration of the estate, and therefore section 54(a) of the Act did not provide the requester with a right of access to these documents.

Upon appeal the FOI Commissioner agreed with the board's position in this matter and denied the requester access to the remaining records on the basis that the request for access did not relate to the administration of the deceased's estate. This ruling means that executors or their agents do not possess the same rights or powers of individuals and are not entitled to all the records that a deceased person would have been during his or her lifetime. Consequently the deceased retains his or her right to privacy except insofar as the administration of his or her estate is concerned. This position is further supported by the fact that the Act's definition of personal information preserves the personal privacy rights of deceased individuals who have been dead less than thirty years.

#### **(G) In Camera Minutes**

Access to the minutes of an in camera meeting to discuss the departure

of a former employee of the Espanola Board of Education (28) were requested. The school board denied access to the record claiming sections 6(1)(b) and 14 of the Act.

While Assistant Commissioner Mitchinson upheld non-disclosure of the personal or financial information of the board employee, the name of the individual appearing in his or her professional or official capacity did not qualify as personal information and could be disclosed. Furthermore the argument of "compelling public interest" in section 16 of the Act did not apply to the discretionary exemption given to section 6(1)(b) in camera deliberations of a board. Interestingly, such disclosure of information even if restricted to reciting a professional job title or official capacity, could in many scenarios still indirectly enable the identification of the individual because often there is only one person holding certain key positions in an institution.

#### **(H) Expense Accounts and Financial Records**

The issue of access to expense accounts has been the subject of at least four IPC Orders that involved school boards, of which three Orders were from the same board requester. The rulings reflect the Commissioner's position regarding the public's right to know information about the expenses incurred by persons employed by the public sector or supplying services to the public sector.

Not unlike other school boards, the Norfolk Board of Education (29) only included at each board session a list of cheque numbers issued by the board to employees, co-op students and service providers, over the last two weeks. While the board gave access to the summary of the disbursements, it did not release the actual account reports naming the individual claimants because it was viewed as disclosing personal information as well as imposing an administrative hardship. This practice was the subject of three separate appeals to the



Commissioner's Office. The Commissioner ordered disclosure of these account reports, and the individual names of each claimant, on the basis that such expenses incurred in the course of carrying out their duties as public employees was not to be considered personal information.

This same principle was found in the Halton Board of Education (30) decision in response to a request to examine the detailed expense accounts of five named individuals over a five-year period, inclusive of receipts, invoices, phone bills and other supporting documentation. The right of access to these extensive records was never denied by the board, or questioned by the Commissioner; rather the issue was who would bear the cost of the disclosure. In this case the IPC agreed with the board's decision not to waive the fee payable to obtain such records.

The Metropolitan Separate School Board (Toronto) (31) was ordered to release copies of expense account sheets, attachments, receipts and credit card statements involving seven named board employees who through employment contracts had right to full and unconditional use of an automobile and all expenses related to it. The use of credit cards was permitted to cover any auto-related expenses, whether they arose from business and/or personal use. The board was unsuccessful in arguing that the information may relate to "personal" financial transactions. The Commission ordered the release of the requested documents because the records related to expenses incurred by persons in their employment capacity and did not meet the definition of personal information.

In two of the appeals the subject of the request was also the person who made the decision to deny access to the records. A postscript at the end of the ruling suggested that procedures should be established to deal with real or perceived potential conflict of interest scenarios. It was recommended that alternate decision-makers should be used in future similar instances.

Overall these five decisions illustrate that access to expense accounts of named individuals employed by or providing services to school boards is permitted by the legislation, although the requester may in some circumstances have to pay a fee to secure such information.

The Metropolitan (Toronto) Separate School Board (31) was the recipient of a request under the Act for documentation about the costs of external meetings, inclusive of any travel expenses. The board contended it had not segregated its files concerning meetings held at external premises from that of internal locations, so the requester was advised that a fee estimate of \$4,140 would be necessary to conduct a search for the exact vouchers and cash receipts. Since the requester was only interested in pursuing the information about the meeting expenses, the board granted access to view the ledger reports, vendor book and serial cheque registers. When the requester found several discrepancies he insisted there must be other accounts he was not shown. In the appeal the Commission agreed that the board had conducted a reasonable search for records and that the appellant's concerns relate to accounting matters about the accuracy of the documents, rather than the existence of the documents themselves.

#### **(I) Law Enforcement**

A request was made to the Toronto Board of Education (33) for copies of 19 records consisting of 37 pages of invoices submitted to the board's solicitor that related to forensic and investigative accounting services provided by the accounting firm (affected party). The investigations involved three different matters: suspected fraud by employees in the continuing education department of the board, which resulted in their discharge from employment; concerns by a board employee that tampering with student transcripts had occurred; and poten-

tial wrongdoing by members of the board's maintenance personnel which did not culminate in police charges, but did result in the subjects of the investigation being discharged and subsequently grieving their terminations, which had yet to be resolved.

The Commission held that internal investigations conducted by an institution as an employer or by an outside party acting on its behalf, such as an accounting firm, do not constitute law enforcement proceedings. It is only "law enforcement" when the investigation is ongoing and could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. At page 5 of the order the inquiry officer stated, "The board could not lay any charges. The mere involvement or interest of the police in the alleged offences does not transform the board's internal investigation into a 'law enforcement' investigation." In addition any investigation must be ongoing, and the institution must show there was a reasonable expectation (not just a mere possibility) of probable harm, in order to claim the discretionary exemption found in section 8. Furthermore, the Inquiry Officer rejected the argument that the release of the records containing the professional fees for services rendered would significantly affect the competitive position of the accounting firm.

#### **(J) Fee Estimates**

In accordance with s.45 of the Act, (34) school boards are statutorily obliged to provide an estimate of the cost for searching, preparing, photocopying and shipping information to a requester. The onus rests on the board to show that the estimated fees were calculated properly and do not exceed the permissible charges outlined in Ontario Regulation 823.(35) The appropriateness of the fee estimates has been the subject of at least three Orders that involved school boards. The rulings have given a stricter interpretation to what is expected of

school boards in fulfilling this obligation.

The Norfolk Board of Education (36) had received a 10-part request for access to files regarding personal and financial matters of the board. In responding to the request the board made an "interim decision", and provided a letter containing a fee estimate for search time, photocopying and labour and also notifying the requester of the waiver provisions available under the Act. On appeal the Inquiry Officer decided that the board did not give sufficient detailed information or evidence to support the fee estimate so it was not permitted to charge it. In addition, the ruling indicated that interim decisions based on the fee estimate are only appropriate if the records requested were unduly expensive to produce.

The Halton Board of Education has received guidance from two IPC rulings on this issue of the "correct calculation of chargeable fees." In the first case, Halton (37) received an access request to examine and receive copies of two years of attendance records from their Adult Computer Training Centre. The board was willing to release the information, minus any personal information content which would identify the program participants, but at a cost to the requester for the computer and manual search time to locate this information, and for the preparation and photocopying expenses for making copies to release. The requester launched an appeal on the basis that the fee estimate was excessive. The FOI agreed that there was insufficient evidence to support the search time estimated for locating some of the records. Also the photocopying charges were duplicitous, as any allowable photocopying fees permitted under the Regulations already include the time spent feeding the machine. On this basis the original fee estimate proposed by the board was revised and reduced by almost 300% as a result of this Order.

The second decision involving the Halton Board of Education (38) concerned a request for five years of records. The original fee estimate exceeded

\$12,000, and would have required an estimated two months of staff time to assimilate the supporting documentation for the expense accounts requested. The requester argued that she was entitled to examine the records free of charge under s.207(4) of the Education Act (39), but the Commissioner ruled that the term "current accounts" under the Education Act did not extend to the requested material, and referred instead to a statement of the board's debits and credits. In response to the request to waive the fee, due to financial hardship, the Commissioner upheld the board's decision not to grant a fee waiver on the basis that passing such a cost onto the public taxpayers was neither fair nor equitable.

#### **(K) Personal Opinions of Elected Officials**

School trustees, as elected officials, are governed by the Municipal Elections Act (40), the Education Act (41), and the Municipal Conflict of Interest Act (42). The latter legislation requires trustees to make a declaration in open board, to be noted on the record, of any "conflict of interest" which is defined as any matter on which they have a direct or indirect pecuniary interest. This conflict extends to any interest held by a spouse or minor child living at home. The operative word is "pecuniary", which means some real or potential monetary benefit. Once a conflict has been declared by a trustee, he or she is to refrain from voting, or participating in the discussions, so as not to influence the vote. Even though the explanation given for the declared conflict of interest is made in public and noted in the minutes, it could still be viewed as revealing personal information about a trustee's personal or financial affairs; yet most public officials are willing to make such disclosures in compliance with the legislation. The IPC Orders reveal a reluctance on the part of trustees to consent to the disclosure of their personal opinions and views about board programs.

Under s.2(1) of the MFIPPA, "personal information" is defined to include any expressed comments or views, and consequently some trustees have objected to this type of information being disclosed. Ironically, while trustees have recognized and complied with the legislative requirement that declarations of monetary interests discussed at board or committee meetings be openly declared and the reasons for the conflict recorded, they have not always wanted their personal opinions and views to receive the same public disclosure. The rationale may be that some personal views held or expressed by trustees on politically sensitive issues may not be popular with the public. A fear held by many publicly elected officials is that a portion of their comments may be lifted from reports and either misconstrued or taken out of context by the media or the electorate. For whatever reason, a number of appeals dealing with the release of reports containing the personal opinions and views of trustees has emerged.

In reviewing this issue as the subject of an appeal in the Halton Board of Education decision (43), the Commissioner granted access to such records on the basis that the views and opinions expressed by publicly elected officials about board programs are not personal information. Only the trustee's home address could be severed from the records.

A second case arose when a Halton school trustee (44) requested all records dealing with opinions expressed by the trustee during a two-month period of board meetings. Although the official was provided with a binder of records distributed at the committee of the whole, the Trustee launched an appeal claiming the board had not conducted an extensive enough search of the records. However, the Commissioner disagreed and ruled that he was satisfied that the requirements of conducting a reasonable search had been met.

In a third case involving the Halton Board of Education (45), a school trustee objected to the board's decision to release certain records, namely a report on the Key Communications Program, which contained the opinions and

views expressed by the trustee. The Commissioner upheld the board's decision to disclose the records due to the fact the trustee's opinions and views on the board program were not deemed to be personal information, because such opinions were expressed in his capacity as a publicly elected official.

It can be concluded from the ruling in each of these cases that publicly elected officials will not be able to rely on the protection afforded by s.2(1) of the MFIPPA to prevent the disclosure of their personal views and opinions.

#### **(L) Board Auditor's Working Papers, Findings and Recommendations**

In accordance with the Education Act (46), the financial records of a school board must be audited on an annual basis in order to satisfy the principle of public accountability in the use of public funds. Two cases have arisen involving the right of access to the board auditor's records, specifically the working papers in one instance, and access to the complete findings and recommendations in another decision.

In June of 1993 the Halton Board of Education (47) received a freedom of information ruling concerning access to a school board's external auditor's working papers. The board had denied the existence of the records and on appeal centered its submissions on the fact the requested records, if in existence at all, were not in the custody or control of the board. In support of its position the board referred to the Institute of Chartered Accountants of Ontario's generally accepted auditing standards which consider audit working paper the property of the auditor, and not the client. While the working papers form the basis for the auditor's opinion, they always remain in the physical possession of the auditor, and, as such, were not records of the institution. The Commission upheld the board's decision not to disclose and agreed that the audit working papers are not records in the custody or control of the school board.

The above ruling can be distinguished from the decision made in the Toronto Board of Education case (48) regarding a terminated board employee's request for copies of the findings and recommendations prepared by Peat, Marwick & Thorne on the school board's operations. The appeal arose when the board claimed no such records existed, and if they did, the records were not within the board's custody and control. Even though the board had submitted affidavit evidence from two law firms and its comptroller attesting to the fact that no audit was requested or carried out by the firm, and denied the existence of any records in their files, the board was rebuked for not conducting a more thorough search. The Commissioner felt that the board should have contacted the accounting firm itself, along with an experienced board employee familiar with the records, an official from the forensic division of the accounting firm, and the board's solicitors in order to satisfy the requirement that a reasonable search had been conducted. The requirement that a more exhaustive search be made may reflect the Commission's reluctance to accept that the final auditor's findings and recommendations do not eventually come within the custody and control of the board. It is also quite likely that the IPC felt the board did have control over auditor's findings and recommendations, both in regulating their usage and in relying upon the content of auditor's reports in order to address any operational problems identified in the reports.

#### **(M) Sufficiency of Searches**

While the Act requires that a search be made within a specified time frame in response to a request for information, several rulings made under the Act have provided some insight into the extent of the search to be conducted. While it is the duty of the school board to clarify the request, it is the duty of the Office of the IPC/Ontario to ensure the board made reasonable efforts to identify



and locate any records. Overall the "reasonable search requirement" is only met by conducting a thorough, detailed and exhaustive search as evidenced by supporting affidavit evidence. The staff time and cost to the school boards were not addressed in these cases, but, by the very nature of the type of searches expected by the Commission, they must have been expensive to undertake.

In response to a request for all school board records concerning the requester, his spouse and three minor children, the Carleton Roman Catholic Separate School Board (49) had to demonstrate to the Commissioner the extent of their search, which included contacting 15 people, examining O.S.R.s, teachers' daybooks, anecdotes and records, school office files, special education files, student services files and transportation files.

Affidavit evidence was also required to satisfy the Commissioner that a board's denial of any records existing about a meeting held between a principal and two students could be substantiated. In this Hamilton Board of Education decision,(50) the affidavits of the FOI co-ordinator and principal swore that no such notes were in existence, and that a reasonable manual search of the files had been conducted, and that further consultations with informed board staff had revealed no records.

Likewise the Halton Board of Education (51) had to satisfy the IPC it had conducted a reasonable search by outlining in its affidavits its record-keeping practices, along with all the steps taken to locate the files, and all inquiries made with knowledgeable staff.

Again supporting affidavit evidence that all reasonable steps had been taken to locate any records was the key to an appeal being denied in the Lanark, Leeds and Greenville County Roman Catholic Separate School Board (52) and the Halton Board of Education (53) decisions. However, the Act did not require an institution to prove to the degree of absolute certainty that the requested records do not exist. (54) Instead, ensuring that all informed sources are con-

tacted for information on the location or existence of files (55), and making reference to any board retention policy to substantiate the destruction of any files (56) have both been noted as key features in obtaining the support of the IPC of a Board's actions.

The appropriateness of the search and the decision letter were the issue in an appeal involving the Metropolitan Separate School Board (Toronto) (56). A disgruntled requester appealed to the Commission about a response letter he received from the school board, which he considered improper. The requester wanted access to the "Ministry confirmation" which the board referred to in its earlier correspondence released to him. He argued that in response to his request the board should have said "no records exist," since he had a Ministry letter stating that there was no formal communication on this matter, instead of being provided with access to a board memorandum to the Minister and a confirming letter from Ministry counsel about the proper interpretation of the phrase "inspect the current accounts of a board." In dealing with this appeal, the Inquiry Officer focused on whether the records provided by the board were responsive to the request. It was held that in the circumstances the decision letter provided by the board was appropriate.

### **Conclusions**

This chapter's review of the forty-eight rulings made by the Office of the IPC/Ontario involving school boards in Ontario indicates that the legislation has raised numerous issues and uncertainties. The nature of the appeals discussed in Chapter 6 shows that boards have encountered interpretation problems in complying with the legislation. While some guidance can be drawn from the above rulings, the amount of time and money spent on the appeals also generates concern about the complexity of the legislation and the enormity of the expectations created by this Act. The following chapter will highlight in greater detail some of the administrative and practical concerns created by the legislation which suggest that revisions to MFIPPA and the corresponding regulations must be made in accordance with the principles of the value framework.

## **ENDNOTES TO CHAPTER 6:**

1. This is the number of school boards in Ontario receiving provincial funding as of July 1994. This information was obtained from the Corporate Policy Leadership Team, of the Statistical Services Department in the Ministry of Education, Toronto. Of the 164 boards in Ontario, 59 are separate school boards and the remainder are public.
2. Copies of the original Orders were obtained from the National Library of Canada and/or the Government Publications Bookstore in Toronto
3. Chart 1 (Appendix K) lists the access to information orders involving school boards in 1992; Chart 2 (Appendix L) lists the privacy investigations conducted on school boards in 1992; Chart 3 (Appendix M) lists the access to information orders involving school boards in 1993; Chart 4 (Appendix N) lists the access to information orders involving school boards in 1994.
4. Wentworth County Board of Education, Order M-11, April 22, 1992.
5. Board of Education for the Borough of East York , Order M-213, November 10, 1993.
6. Lambton County Board of Education, Order M-18, May 22, 1992.
7. Halton Board of Education, Order M-65, November 19, 1992.
8. Etobicoke Board of Education, Order M-29, July 30, 1992.
9. Timiskaming Board of Education, Order M-231, December 3, 1993.
10. Halton Board of Education, Order M-145, June 11, 1993.
11. Kirkland Lake-Timiskaming Roman Catholic Separate School Board, Order M-221, November 19, 1993.

12. Boards of Education are permitted to appoint psychologists in accordance with section 171(1) para. 6 of the Education Act R.S.O. 1990 chapter E.2.
13. The Lincoln County Board of Education, Order M-91, March 2, 1993.
14. The case is now under judicial review before the Ontario Divisional Court. A stay of the Commissioner's ruling has been obtained in the interim, pending the outcome of the court proceedings. Rule 13 of the Ontario Rules of Civil Procedure permits other interested and affected parties to seek intervenor status in the judicial review of this decision.
15. For example, if the student's answer in the vocabulary section was "a ten-cent coin," the question could be indirectly assumed to be "what is a dime?" Likewise, if in the absurdities section of the test, the student's answer was the "absurd feature of this picture is that the man has three arms", then by implication the answer reveals the nature of the picture, and the correct response.
16. Carleton Board of Education, Order M-27, July 13, 1992.
17. Access to Ontario Student Records (OSRs) are governed by section 266 of the Education Act, R.S.O. 1990, chapter E.2.
18. Dufferin-Peel Roman Catholic Separate School Board, Order M-55, October 30, 1992.
19. Student suspensions and expulsions are dealt with in section 23 of the Education Act. R.S.O. 1990, chapter E.2
20. Halton Board of Education, Order M-8, March 5, 1992.
21. Regional Municipality of Sudbury, Order M-26, July 10, 1992.
22. The Northern District School Area Board, Order M-122, April 22, 1993.
23. Hornepayne Board of Education, Order M-256, February 1, 1994.
24. The Wellington County Board of Education, Order M-96, March 9, 1993.

25. The Cochrane, Iroquois Falls, Black River-Matheson District Roman Catholic Separate School Board, Order M-99, March 10, 1993.
26. The Windsor Board of Education, Order M-104, March 24, 1993.
27. Welland County Roman Catholic Separate School Board, Order M-206, October 26, 1993.
28. The Espanola Board of Education, Order M-47, October 7, 1992.
29. Norfolk Board of Education, Orders M-106, M-107, M-108, all rendered March 25, 1993.
30. Halton Board of Education, Order M-166, July 23, 1993.
31. Metropolitan Separate School Board (Toronto), Order M-259, February 4, 1994.
32. Metropolitan Separate School Board (Toronto), Order M-255, February 1, 1994.
33. Toronto Board of Education, Order M-258, February 4, 1994.
34. Section 45(3) of MFIPPA states that, "The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under the Act that is over \$25."
35. Permissible charges are set out in Ontario Regulation 517/90, as published in the Ontario Gazette.
36. Norfolk Board of Education, Order M-103, March 11, 1993.
37. Halton Board of Education, Order M-163, June 16, 1993.
38. Halton Board of Education, Order M-166, July 23, 1993.
39. Section 207 (4) of the Education Act, R.S.O. 1990, E.2 can be found in Appendix J.
40. The Municipal Elections Act R.S.O. 1990, chapter M.53.
41. Reference should be made to the sections in the Education Act R.S.O. 1990, chapter E.2 governing the election of Trustees as set out in section 230; the eligibility requirements for being a Trustee as set out in sections 219-220 and the

declaration of the oath of office and confidentiality provisions as found in section 209.

42. The Municipal Conflict of Interest Act R.S.O. 1990, chapter M.50.

43. Halton Board of Education, Order M-113, March 31, 1993.

44. Halton Board of Education, Order M-126, April 26, 1993.

45. Halton Board of Education, Order M-154, June 28, 1993.

46. The necessity for conducting audits is found in section 234 of the Education Act R.S.O. 1990, chapter E.2.

47. Halton Board of Education, Order M-152, June 25, 1993.

48. Toronto Board of Education, Order M-148, June 21, 1993.

49. Carleton Roman Catholic Separate School Board, Order M-100, March 10, 1993.

50. Hamilton Board of Education, Order M-134, May 28, 1993.

51. Halton Board of Education, Order M-137, June 2, 1993.

52. Lanark, Leeds & Grenville County Roman Catholic Separate School Board, Order M-136, May 31, 1993.

53. Halton Board of Education, Order M-80, January 29, 1993.

54. Halton Board of Education, Order M-140, June 9, 1993.

55. Toronto Board of Education, Order M-148, June 21, 1993.

56. Simcoe County Board of Education, Order M-156, June 30, 1993.

57. Metropolitan Separate School Board (Toronto) Order M-259, February 4, 1994.

## **CHAPTER 7**

### **ADMINISTRATIVE CONCERNS FOR CONSIDERATION IN THE LEGISLATIVE REVIEW**

In order to review the effectiveness of the legislation a mandatory review period was incorporated into the Act. (1) This means that the Standing Committee in the Legislative Assembly must undertake a comprehensive review of the Act before January 1st, 1994, which is within three years of the legislation initially being proclaimed in effect. Thereafter, the Act requires the Committee to make recommendations to the Legislative Assembly within one year regarding amendments. For the purposes of making these recommendations the Committee is to assimilate submissions from various bodies and interested persons on issues which need to be addressed by the Standing Committee. (2)

At the time of the writing of this paper the Standing Committee had requested submissions but had not yet released its findings in a formal report, which is due by January 1, 1995.(3) However, since the wording used in MFIPPA is analogous to FIPPA, reference can be made to the province's three-year review to identify some of the problems encountered. In the review of the parallel provincial legislation a number of issues were raised by a cross-section of various ministries, boards and tribunals whose work involved freedom of information matters. For the purposes of this chapter we will concentrate on the administrative problems identified as in need of review and possible amendment.

#### **(A). Frivolous or Vexatious Requests**

Provincial ministries have complained about receiving non-bona fide requests which monopolize staff time and effort and constitute a considerable

waste of money, without necessarily advancing the true purpose behind the legislation. Requests that could be classified as trivial, frivolous, vexatious or otherwise an abuse of the access rights afforded by the freedom of information legislation have resulted in the need for legislative reform of the Act.

Possibly some deterrence of trivial, frivolous and vexatious requests could be accomplished by introducing an application fee for all those utilizing the Act, or by including a provision in the legislation allowing for the imposition of a penalty on those persons who repeatedly abuse the Act. Unlike the federal legislation, FIPPA and MFIPPA currently have no application fee for requests filed under their respective Acts, so there is nothing to discourage repeated abuse of the procedure by those who elect to make multiple requests. In fact the lack of a fee, coupled with the provisions in the Act allowing for two free hours of search time per request, actually encourages requesters to divide one request into several separate requests for the purposes of maximizing the free search time available. As Chapter 8 will reveal, this is a real problem experienced by boards, not just a theoretical or potential one.

While the introduction of a nominal application fee may deter some, it does create administrative costs for institutions to process the fees collected. In this regard we can learn from the federal government's experience as it has employed the use of "application fees" from the outset. The Federal Standing Committee on Justice and the Solicitor General in its three-year review of the analogous federal legislation recommended the rescinding of the existing application fee of \$5.00, since the amount collected was miniscule compared to the cost of administering the legislation. There was also concern that the presence of a fee (regardless of the amount) may deter "worthy access requests." (5) Rather than continuing the use of application fees the federal committee recommended the introduction of a statutory provision authorizing an institution to disregard "frivolous or vexatious" requests. These sentiments were echoed in Bill



120, an Ontario Private Member's Bill, which was introduced for first reading on June 6th, 1991 specifically to address this issue of frivolous and vexatious requests in both the provincial and municipal fields. (6) The problem posed by the recommended wording is that it involves a subjective determination of what constitutes "frivolous or vexatious" and what "amounts to an abuse of the right of access." Naturally this liberal wording can lead to inconsistent rulings and possibly abuse by institutions. (7)

How does one define "frivolous or vexatious" or "an abuse of the process?" Since the proposed legislation provided no criteria we must consult other sources for guidance. One such source is the judicial system. The courts have dealt with "vexatious" court proceedings under the authority of the Courts of Justice Act (8) which allows for an application to a judge of the Ontario Court (General Division) seeking an order that previously instituted court proceedings not be continued, or that no further court proceedings be instituted, except by leave of the court (9). However, a review of the amendment proposed in Bill 120 reveals that it does not involve any appeal to a court. Instead the Office of the IPC/Ontario is to make the final determination on an institution's denial of access, without judicial recourse. While the use of the courts may inject a certain element of objectivity into the review process, and prevent an adverse public perception of the Commissioner's Office as an agency lacking independent status, the application to a court can be very time-consuming, and of course can be very costly, especially with a possibility of an "award of costs" against one of the parties. In addition, such a mechanism may be more onerous to requesters (who may lack the resources to respond to a court application) and arguably, therefore, could lead to less access to government-held information, which is contrary to the whole purpose and scheme of the legislation.

### **(B) Multiple Requests by the Same Requester**

One valid request strategy is the filing of multiple requests on the same topic, otherwise known as "request splitting." Some view this method of requesting information as an abuse of the legitimate process, because it offers the requester two hours of free search time on each separate request, and, of course, represents more paper work for those administering the Act, as each individual request must be separately responded to within the thirty-day time period. Due to the potential abuse that exists, recommendations have been made to consolidate requests which are substantially similar or closely related.

The 1990 Annual Report of the Office of the IPC/Ontario indicated that during the initial three-year period that FIPPA was in place the majority of requests were made by individuals, as opposed to businesses, researchers, the media or other associations. (10) However, the statistics also revealed that a large percentage of the requests received could be attributed to the same individual filing multiple requests. There are in fact a number of individuals who have gained a reputation for utilizing the Act on numerous occasions. As Chapter 8 will describe there have also been instances where each member of the same association requested information about different aspects involving the same matter in an attempt to circumvent payment of fees.

The first report to publish statistics on the use of MFIPPA was the 1991 Annual Report of the Office of the IPC/Ontario. The data showed that the majority of requests were still made by individuals, especially in relation to requests for personal information records. However, there was a slightly larger number of associations and media representatives requesting access to information from municipal institutions than from provincial ministries. (11) Similarly, the 1992

Annual Report of the Office of the IPC/Ontario reported similar trends in the 1992 calendar year with an overall 14% increase in the number of appeals under MFIPPA.(12) The 1993 Annual Report was not yet available for comparison purposes. So far the pattern indicates that the primary user of the appeals system is the general public, rather than businesses or other kinds of organizations. However, it is difficult to rely on the IPC statistics due to the fact that MFIPPA and FIPPA do not require appellants to identify or provide information about themselves. Therefore the IPC data is only an attempt to generalize about the various categories of requesters.

### **(C) Practical Problems in a User Pay System: Fees, Fee Estimates and Fee Waivers**

The user pay system inherent in the legislation creates additional administrative problems. For example, the wording found in Section 45 of the MFIPPA is the same as the amended wording of Section 57 of the FIPPA. The analogous wording has allowed municipal bodies to refer to the Orders granted by the Office of the IPC/Ontario prior to January 1st, 1991 in interpreting the legislative intent of these provisions governing the charging and waiving of fees in the municipal context. Both Acts require the Head to charge fees to requesters (unless the request concerns access to their own personal information held by the institution). (13) The purpose of the fees is to cover the administrative costs connected with locating, preparing, processing, copying and shipping any records for disclosure.

However, there are restrictions in the legislation and regulations governing when fees can be charged, the amount of fees to be charged, the waiver of fees and the review of fees, all of which have created some practical administrative problems and some potential areas for abuse. For example, Section 45 (1) (a) only permits a "search charge" for every hour of manual search required in

excess of two hours to locate a record. For most institutions locating a record in under two hours is not a major problem due to various records management systems already in place; rather it is the time reviewing the records and their contents which is the most time-consuming and often requires the assistance of experienced senior staff members. Unfortunately, there is no provision in the legislation allowing the charging of a fee for the reviewing of the records, despite the fact it may involve several hours, days or weeks to complete, depending on the complexity of the request or the volume of the records. Each document within the file record will need to be scrutinized to ensure it does not contain personal information, or third-party information or fall within an exemption under the Act precluding its disclosure. The Commissioner has ruled that the time spent in making a decision as to the application of an exemption should not be included when calculating fees relating to the preparation of a record for disclosure. (14)

A second administrative requirement is that of providing a reasonable fee estimate to any requester who may be charged a fee over \$25.00 for the information requested. This requires the time and advice of experienced employees knowledgeable about the records in question. (15) Once the fee estimate has been issued to the requester the thirty-day period is suspended pending the receipt of the monies or the approval to waive the fee.

The requirement of providing a fee estimate raises a third significant issue, that of fee waivers. When the Act was proclaimed, it was clear that the legislative intention was to include a user pay principle. (16) However, in accordance with section 45 (4) of the MFIPPA (and section 57 (3) of FIPPA) it is mandatory for the Head to waive the payment of all or part of any fee required to be paid under the Act if in the Head's opinion it is fair and equitable to do so. In rendering such a decision the Head determines if a waiver is appropriate by considering the following exhaustive list:

- a. The extent to which the actual cost of processing, collecting and copy

-ing the record varies from the amount of payment required by subsection(1) ;

b. Whether the payment will cause a financial hardship for the person requesting the record;

c. Whether dissemination of the record will benefit public health or safety; and

d. Any other matter prescribed in the regulations. (17)

Therefore, while it is mandatory for the Head to consider a request for the fee waiver, it is still discretionary whether one is granted or not.

While the onus is on the requester to raise the matter of a fee waiver, (18) the Commissioner has determined that it is up to the school board to advise requesters of the fee waiver provisions when issuing the fee estimates. (19) Furthermore, Section 45 (5) of the MFIPPA prescribes that a person who is required to pay a fee can ask the Commissioner to review the amount of the fee or the Head's decision not to waive the fee. So even though the requester seeking a fee waiver bears the burden of establishing his or her case, the school board's decision is still subject to an appeal process and review by the Commissioner. That in itself incurs administrative costs for all parties concerned.

One of the criteria for granting a waiver is inability to pay the fee. In determining whether the payment will cause a financial hardship for the person requesting the records, the Commissioner has decided that the requester must provide the institution with information concerning his or her financial position, including assets, income, expenses, and so on. (20) However, my inquiries to the Commissioner's Office revealed that there were no specific financial forms to complete, and the information submitted need not be sworn or checked for any accuracy. (21) In the case of prison inmates, simply providing information of their present and projected earnings during confinement or the mere fact they are incarcerated does not satisfy the burden of proof that there is a financial

hardship. (22) It is notable the Commissioner has also ruled that non-profit organizations do not automatically qualify for a fee waiver based on financial hardship. (23)

Pursuant to section 45 (1) of MFIPPA, costs can be recovered for search time in excess of two hours, cost of preparing the record, computer costs, photocopying costs and shipping costs, but are subject to the maximum allowable photocopying charges as prescribed by regulation. Shipping costs have been determined to be appropriate if the requester lives outside the municipality where the records are located, or if the records are stored at an off-site location. (24) Interestingly, the legislation is silent about the collection of costs for clerical staff time to do the photocopying or typing. Those who do not wish to secure an actual photocopy of a document may request access to the original so as to personally view the document as an alternative mechanism to requesting a copy. This means that the institution must allow the person access to its premises, to sit with him or her at the office or other designated location and allow him or her to review the document at leisure. It has been stipulated that an alternative practical location must exist to accommodate requesters who live outside the jurisdiction where the head office of the institution is located.

#### **(D). The Necessity of Reports**

In accordance with Section 24 of MFIPPA the Chairman of the Management Board of Cabinet was obliged to publish by January 1st, 1991 a compilation of all institutions. The purpose of this listing was to identify where a request for a record should be made and the title of the Head of the respective institution covered by the Act. Thereafter an updated listing must be published every three years. In contrast, the FIPPA (25) requires the responsible Minister (of the respective Ministry of the Government of Ontario) to publish annually a

compilation of all institutions, including available library or reading rooms, and an indexed compilation detailing the programmes and operations and types of records held by each of the institutions.

The two Acts have parallel provisions requiring an annual report to be prepared by the Head of the institution for the Commissioner outlining the number of requests made under the Act; the number of refusals and the reasons for the refusal; the number of uses and purposes for which personal information is disclosed; the amount of fees collected, and any other information indicating an effort by the institution to put into practice the purpose of this Act. (26) The questionnaire form that the Commissioner requests be completed annually by each institution has a revised format from that initially used in 1991.

Naturally the requirement for record keeping and reports creates certain administrative demands on institutions. Unfortunately due to the economic situation few school boards elected to or were financially able to, authorize the hiring of additional or specially trained staff, full or part-time, to implement the Act or to perform the administrative task of preparing reports. Instead the task was primarily delegated to existing staff, usually persons who held mid-management or senior levels jobs in the area of finance, communications or human resources. Regardless of who was delegated the responsibility for completing the report, they were often relying on staff in other departments to provide them with the requisite statistics on the number of requests received and on how they were processed. That in itself raises some questions about the reliability of the reporting process, and the overall statistics produced by the Commissioner's Office. Variables such as staff subjectivity in identifying the matter as a freedom of information request, and staff reliability in monitoring its progress through the system, or staff even accurately remembering the number of requests made for inclusion in the annual report would all affect the accuracy of the data reported to the Commissioner.

#### **(E). Obligation to Make Record Index Available to the Public**

In order to assist the public in making requests for access to information, the legislation requires the publication of a listing of the types of records in a school board's control and custody. In this manner an individual with a specific concern will be aided by the knowledge of whether or not the institution collects or retains that type of information. Under Section 25 of the MFIPPA it is mandatory for the Head to make available for inspection and copying by the public information containing:

- (a) a description of the organization and responsibility of the institution;
- (b) a list of the general classes or types of records in the custody or control of the institution;
- (c) the title, business telephone and business address of the Head; and
- (d) the address to which a request under this Act should be made. (27)

Many boards in the survey complained that the amount of staff time required to complete these tasks was onerous due to the fact records are kept at each school under the jurisdiction of the board, separate and apart from those records centrally located at the educational administrative offices.

#### **(F) Cost of Operating the Office of the IPC/Ontario**

Public trust in the integrity, efficiency and effectiveness of the Office of the IPC/Ontario is also a concern. Although the appeal process exists, if it is viewed as too cumbersome or slow, the public will view the Office of the IPC/Ontario as just another level of bureaucracy. Delay in the handling of an appeal is perceived as non-responsive. How then will the millions of dollars it annually costs to oper-



ate the IPC be justified? Administratively, the IPC reported in 1991 that it required a budget of \$5,588,184, which rose sharply to \$7,384,019 in 1992, and then increased slightly once more to \$7,635,906 in 1993.(28) Since 80% of each budget has been used for salaries and benefits, it raises a concern about how little monies have been directed into fulfilling the educational component of the IPC mandate.

The Office of the IPC/Ontario conducted a telephone survey of appellants, the bulk of which are individual members of the public, which revealed a general dissatisfaction with the appeal process. To overcome the public's poor perception of the office, some initiatives were introduced in 1992 by the Office of the IPC to increase efficiency and improve service. The plan was to take effect in two stages: phase one was implemented as of October 1, 1992 and phase two was effective January 1, 1993. The initiatives included such things as: designating more senior staff to sign orders; writing orders in a more concise style in an effort to make them faster to produce and easier to read, and setting a target of four months in which to resolve an appeal.(29)

The following chapter will examine some of the other administrative concerns identified by school boards that go beyond merely implementing new procedures or initiatives. Many of these concerns were drawn from the results of the questionnaire and will require legislative clarification.

## **ENDNOTES FOR CHAPTER 7:**

1. The provision in the FIPPA is section 68, and the provision in the MFIPPA is section 54.
2. In regards to the review of the FIPPA, Douglas Arnott, Clerk of the Standing Committee on the Legislative Assembly, advised the public that hearings on the Freedom of Information Act 1987 were to be held in February 1991 and the Summer of 1991 for the purposes of submitting a report to the Legislature on its findings and recommendations on or before December 12th, 1991.
3. Submissions were received in January 1994 in relation to the review of MFIPPA, but to date no report has been issued by the Standing Committee. In accordance with the legislation a report must be issued by January 1, 1995.
4. The search time provisions are found in section 45 of the MFIPPA and section 57 of the FIPPA.
5. The Federal Standing Committee on Justice and the Solicitor General's report revealed that a \$5.00 nominal fee had been charged in accordance with Section of the Act. However, this fee was considered an unfavourable provision as it created certain administrative duties.
6. The status of the Private Member's Bill 120 is that it has only received a first reading on June 6th, 1991.
7. The relevant provisions are Section 50(a) of MFIPPA and Section 63(a) of FIPPA.
8. The Courts of Justice Act R.S.O. 1990, chapter C.43, section 150.
9. An example of the recent discussion which the court held under Section 150 of the Courts of Justice Act R.S.O. 1990, chapter C.43 in which it granted such an order and discussed the relevant criteria is that of the case of
10. See Table 16 found on page 38 of the 1990 Annual Report of the Information and Privacy Commissioner/Ontario. Note there has been an average of 53.3% of the requests being made by individuals since 1988-89-90.
11. See Table 17 on page 47 of the 1991 Annual Report of the Information and

Privacy Commissioner/Ontario. While the province experienced 33.9% of its requests from businesses, municipal institutions could attribute only 18.1% of their requests to businesses. However, municipal entities received more requests from associations and the media, than did the province, specifically 16.7% as opposed to 4.3% and 11.3% as opposed to 2.9% respectively.

12. The 1992 Annual Report of the Information and Privacy Commissioner/Ontario, p.14.

13. The fee provisions can be found in Section 45 of MFIPPA and Section 57 of FIPPA.

14. See Orders 4 and 105.

15. See Orders 81, 86 and 132.

16. See Orders 6, 67, 111, 184 and 185.

17. In Order 6 the Commissioner moved that a fee waiver in the "public interest" is not a criterion for the waiver listed in Section 57 (3) (c) of FIPPA, as the wording states specifically "public health or safety". Also Order 2 ruled that a fee waiver was not automatically required simply because the record contained some information relating to health or safety matters.

18. See Orders 4, 5, 10 and 30.

19. See Orders 81 and 86.

20. See Orders 105, 184 and 185.

21. There are no financial forms universally circulated as a basis for qualifying for or determining financial hardship.

22. See Orders 95, 105 and 117.

23. See Order 111.

24. See Orders 6, 7, 8 and 67.

25. Section 31 of FIPPA is the reciprocal provision to section 24 of MFIPPA regarding the issue of filing reports.

26. The annual report requirements are listed in section 34 of FIPPA and section

26 of MFIPPA.

27. Section 25 of MFIPPA has an analogous provision in section 32 of FIPPA.

28. These expenditure figures were taken from the auditor's reports in the 1991 Annual Report of the IPC/Ontario at page 76, and the 1992 Annual Report of the IPC/Ontario at page 40. These figures represent the cost of wages and salaries, employee benefits (i.e. pension plan contributions), transportation and communication, services and supplies and equipment. However, the cost of salaries and benefits make up almost 80% of each budget.

29. The 1992 Annual Report of the Office of the IPC/Ontario, at page 12.

## **CHAPTER 8:**

### **CONCLUSIONS AND RECOMMENDATIONS**

The purpose of this chapter is to provide a summary of the questionnaire results and to suggest how the current legislation could be improved in order to be more effective, efficient and fair for school boards. In suggesting constructive amendments to the Act, consideration needs to be given to the efficiency, effectiveness and fairness of the Act in its current form. Many of the recommendations made for improvements to the legislation have been drawn from the analysis of the Act in light of the elements found in the value framework, which was explained in chapter 1. The proposed changes also reflect the survey comments and findings, and draw upon the submissions made to the Standing Committee by an association representing school boards across the province.

#### **Summary of Questionnaire Results:**

Fifty of the 102 boards of education that received a copy of the questionnaire completed it. The respondents were then categorized by size based on the number of students under their jurisdiction. Of the 50 boards that responded, 9 were categorized as very small boards ( under 2,500 students); 7 were categorized as small boards ( between 2,501 and 10,000 students); 17 were categorized as mid-sized boards ( between 10,001 and 20,000 students); 7 were categorized as large boards ( over 20,001 students) and 10 were categorized as very large boards ( over 35,000 students). In reporting on the survey findings, no reference to any specific board will be made. In addition to reporting on the general findings, some comparisons will be made among the various categories of boards in regard to the degree of implementation, understanding and experience with the legislation.

With respect to the appointment of a Head, in virtually all cases the Chair or the entire Board held this role. This is consistent with the requirement set out in section 3(2) of the Act.(1) Thereafter the Board or Chair usually delegated to the Director of Education and Secretary to the Board the onus of taking whatever measures were necessary to comply with the legislation. In most cases this resulted in the Director designating one or more staff members to perform the practical daily responsibilities of the Act. The exception was found among the very small and small boards where the daily FOI responsibilities remained with the Director in 19% of the cases. However, for the most part the Director delegated the responsibilities of the Act to existing staff who already held a variety of portfolios. The staff assigned with FOI responsibilities were generally in the business, finance, communications or human resources departments.

Only 20% of all boards had hired new staff responsible exclusively for information and records management and FOI matters, of which 6% were hired on a non-renewable contract basis. More specifically, of the 16 very small to small boards, only one had hired a new part-time staff person, while one other board had hired a full-time person on a two-year contract to deal exclusively with the obligations imposed by the Act. Among the 17 mid-sized boards, only four had hired new staff, two of which were half-time positions. Of the remaining two full-time positions, one was a two-year contract job. The most surprising results were among the large and very large boards. Only one out of ten very large boards had hired an FOI co-ordinator, and that was a recent appointment in January of 1993 on a contract basis. Likewise, only three of the seven large boards reported hiring full-time information and records officers. Overall the survey results indicate that school boards in general did not allocate sufficient funds or staff to implement this legislation. Possibly it was viewed as a low priority in light of the fact that school boards already deal with many other pieces of legislation that impact on school board operations.(2) Alternatively, school boards

may have questioned the need for the freedom of information legislation in light of current practices at the local government level and speculated that there would be so few inquiries that it would not be necessary to hire new staff.

Section 25 of the Act prescribed that each board was to have a directory listing all of its general records and personal information banks. This was to be viewed as a preliminary step in readying each institution for enforcement of the Act. Notwithstanding this prerequisite, the preparation of a directory had still not been done by 24% of all the boards who completed the survey. More specifically, 37.5% of the very small to small boards, 23.5% of the mid-sized boards, and 11.8% of the large to very large boards had still not completed a directory. It appeared that the larger the board, the more likely there were staff made available to undertake such a project. However, the larger the board the more massive the undertaking, which is probably why only the large to very large boards usually refused to provide a copy of their directory, as requested, due to its size. Instead they indicated it was available upon request for inspection or purchase. It is questionable whether this requirement to prepare a directory listing the types of records in their custody and control was fair to school boards. Imposing such an onerous task in a time of a funding crisis, without providing additional monies for internal or external help placed school boards in an awkward position. Since the purpose of the directory was to provide some guidance to a requester in terms of the types of records being kept by an institution, possibly the government could have devised a generic directory applicable to most boards, and saved all boards the time and expense preparing their own.

In order to assist staff in learning about and complying with the Act, the boards were asked to report on what informational material they had created internally. Policy and procedures manuals were developed by 25% of the very small to small boards; 65% of the the mid-sized boards and 47% of the large to very large boards. This means that 46% of all boards had created policy and

procedures manuals. In contrast only 32% of all boards had created pamphlets, and 58% of these boards were large or very large. It was surprising that so few boards had prepared a pamphlet when it involves far less work than a manual. Possibly it was perceived that a procedural manual would be more useful to a board than a generic pamphlet. Also, boards are generally more familiar with drafting policy and procedures which may explain the higher percentage of boards performing this task. However, a pamphlet might have been an effective method of training or informing staff about the impact of the legislation on their respective practices and professions, especially in light of the large number of boards that reported that the majority of their staff had not been formally trained about the Act. Overall, the fact that less than half of all boards had created policy and procedures manuals or pamphlets was surprising since assistance and materials had been provided free of charge from the Management Board Secretariat. In the area of videos only one mid-sized board reported creating its own video, despite the fact that almost all boards have internal multi-media and print centres, with staff capable of creating a video as a low-cost, in-house project. In addition, only 6% of all boards reported using the free government video available through the Management Board Secretariat as a tool to educate their own staff.(3)

In regard to staff training most boards took advantage of the information sessions offered by the government and various law firms. Almost all the school boards sent at least one staff member for training prior to the Act taking effect. A few boards reported sending a substantial number of staff. (4). For the most part, one staff member, after one informational session, was expected to inform all of his/her colleagues. Not surprisingly, the transfer of this one staff member's knowledge about the Act to the rest of the board staff was not effectively done in most boards. It was probably not a realistic task in light of such persons holding other portfolios not related to FOI. Most significantly, 50% of the boards, regard-



less of their size, reported that their teachers, support staff and human resource personnel were not provided with any training or informational sessions about the impact of the Act on their professions or practices. This is ironic in light of the fact that these three categories of employees make up at least 80% or more of the entire staff, and that the very nature of their jobs requires the handling of personal information and involves record management and retention on a daily basis.

Despite the admitted wide-scale lack of training sessions for staff, only 4% of all boards rated their staff's overall awareness of the legislation as "poor," and only 8% of all boards rated their staff's overall understanding of the legislation as "poor." This is interesting since awareness of the legislation and understanding of this rather complex Act should be contingent upon staff being formally advised about and trained in how the Act impacts upon their jobs. Even though over 50% of the boards had not trained or informed their front-line staff, 56% of all boards rated their employees' awareness of the legislation as "good", and 16% rated it as "excellent." Likewise, 46% of all boards rated their staff's understanding of the legislation as "good" and 6% as "excellent."

In regard to the number of written requests received under the Act since its passage, 84% of all boards reported having received at least one request. Among the boards surveyed the number of requests varied from one to several hundred. Of the 16% of all boards that had not received any requests it is notable that they were either a very small, small or mid-sized school board with under 20,000 students. All the large and very large school boards had received requests, with the majority of them receiving ten or more requests.

Although a large number of the boards had received written requests under the Act, only 20% of all boards had been successful in collecting any fees, despite the fact that 44% of all the boards had issued fee estimates. Not only was the rate of fee collection low, so was the monetary amount the boards were

able to collect, reportedly ranging from \$25 to \$500. In total only about \$1,000 in fees has been collected in three years by the 50 boards participating in the survey. In applying the value framework to an analysis of the success of the legislation it would appear that the cost recovery for boards was minimal to inconsequential in relation to the costs in staff time to search and reply to any requests, and the time required to prepare a directory, and train staff on how to comply with the Act or process an appeal. Considering that 44% of all boards reported having been through the appeal process it is likely they also incurred legal assistance and expenses in preparing their defence documentation, the cost of which would far exceed the fees collected or collectible.

Regardless of the size of the board or its location within the province, school boards generally expressed concerns that there were barriers to either implementing or administering the legislation. By far the most frequently cited complaint was the difficulty of interpreting the legislation. One FOI co-ordinator of a very large board described the Act as "too general and convoluted."<sup>(5)</sup> Some of the other administrative concerns experienced and reported were as follows: understanding the request; locating the requested records; lack of sufficient staff to develop the directory or educate other staff; applying the correct part of the Act to each individual request; explaining the Act to others because there are so many variables; dealing with interested third parties unfamiliar with the legislation; finding documentation which is more than 25 years old, or prior to the board's establishment; complying within the 30 day rule due to Christmas and summer holidays when boards are traditionally short-staffed; the lack of an existing record-keeping system; the difficulty and amount of time required to calculate the fee or estimate the time necessary to collect information; re-scheduling staff members' duties so as to respond to requests within 30 days; and handling vexatious or frivolous requests for information. This latter complaint was illustrated by one small board that reported a requester asking for volumes of

student and program information, which staff spent hours collecting, only for the requester to subsequently refuse to pick up the information on the basis that he was just angry with the board and wanted to put its administrators through some hoops. (6)

#### Recommendations:

The Ontario Public School Boards' Association, (hereinafter referred to as O.P.S.B.A. or the Association), which represents over 90 public school boards of education of all sizes and from all regions of the province (as listed in Appendix O), prepared a submission in January 1994 containing its comments on the Act. This submission was prepared for the consideration of the Standing Committee of the Legislative Assembly in its three year review of the municipal Act. A summary of the recommendations can be found in Appendix P. Several of the issues raised by O.P.S.B.A. reflect the same concerns and comments made by respondents to the questionnaire that was distributed for the purposes of collecting data for this thesis.

A general concern raised by O.P.S.B.A. was that while the Act's perspective is narrow, its coverage is too broad. (7) The basis for the association's criticism is that there is only one set of rules applying to a cross-section of varying entities. Since the public sector is not homogeneous in its manner of collecting, retaining, using and disclosing information, it is not appropriate that only one Act be used to cover so many different institutions -- boards, agencies and municipalities.

Furthermore, as evident in the section index found in Appendix D, both the provincial and municipal versions of the Act have similar provisions, even though the nature and functioning of the different levels of government to which they apply are considerably different. Despite the existence of separate provincial and municipal information and privacy statutes, both Acts contain the same basic

rules and principles. The wording in many of the sections appear to be drafted in contemplation of a large provincial bureaucracy which has operations, functions and financial resources different from those of school boards. The questionnaire responses clearly showed that the degree of implementation, and levels of awareness and understanding of the legislation varied among the school boards, often in relation to their size and location within the province and their experience with requests and appeals under the Act.

Anyone who has used the Act can affirm that it is both costly and complex. Many boards expressed concern in the survey about the complexity of the legislation in both its interpretation and application and the amount of time consumed in locating files and preparing fee estimates in response to requests. Other boards commented on the lack of sufficient staff to administer the Act, along with the inherent expense for boards to comply with the obligations imposed by the Act. For example, the Act required that effective January 1, 1991 each board was to prepare a directory listing all of its records and personal information banks, and then to revise and update this directory as necessary. Of the boards surveyed, 24% still did not have a directory prepared three years after the requirement took effect. Others were involved in updating their existing directory. Those boards that did have a directory found that it often consisted of hundreds of pages. For this reason many boards made only limited copies available for inspection, and charged a fee if a copy was requested.

The complexity of the Act is also evident in the legal form called a "notice of inquiry" that an institution must file before an access dispute is decided by the Commissioner. Compliance with this formality requires assistance from legal counsel, which for most boards in Ontario is an outside service acquired at considerable expense. The nature and existence of these forms illustrates that the appeal process has taken on a form of litigation, more easily understood by lawyers than laymen. While the legislators who drafted the Act may not have

intended for this to occur, the fact this complexity exists needs to be addressed in the review and appropriate revisions made to the Act.

Compliance with the obligations imposed by the Act requires boards to employ a full-time information and privacy coordinator; yet the survey clearly showed that only 20% of the responding boards had hired a new staff member or designated an existing staff member to deal exclusively with freedom of information issues as a full-time responsibility. In the majority of cases the school boards' FOI coordinator was an existing staff member who had acquired these duties, with little training, in addition to other portfolios. A number of boards cited short staffing as an ongoing concern, but for different reasons. At some boards the staffing shortage was a reflection of there being too little staff to deal with the number of requests or appeals received by the board , within the 30 day time period prescribed by the Act. At other boards the staffing complaint arose from the ongoing need to ensure proper records management within the institution -- both at the central administrative office and the satellite schools.

Some of the duties required by the Act include the preparation of indices and decision letters in response to access requests. Due to the wording in section 4(2) of the Act, which permits the severing of documents, a school board must examine each separate line, sentence or paragraph of a document and detail the legal rationale for denying access to each part. This is an onerous task requiring time and knowledge of the Act and an understanding of the rationale in prior decisions rendered by the Commissioner.

A major frustration with the legislation is the lack of mechanisms to enable cost recovery. In complying with the Act there are a number of costs that boards cannot recover. For example, the Commissioner's requirement that institutions send in copies, at their own expense, of all records that are in dispute in the event of an appeal is a cost that cannot be recovered under the Act in its current form. While the legislation does give an institution the option of inviting the

Commissioner's staff to view the original records on site, the Commissioner's Office has been reluctant to do because of its own time constraints and limited staff. Requesting that the Commissioner travel to remote areas of the province to view documents is not a practical option available or encouraged in most instances.

Another example of the inability of school boards to recover costs was related by a small school board, but has application to all boards. A loophole in the Act permits requesters to avoid payment of fee estimates. The FOI co-ordinator for the small board related this frustrating experience. Initially the board in question received five requests for a huge amount of information involving a large cost for which fee estimates were issued. Upon receiving the estimates, the requesters informed the board they were part of a coalition of 100 individuals and asked that the fee be waived. When the board refused, the initial requests were withdrawn and subsequently re-submitted breaking each request down to one piece of information per individual to avoid the fees applicable under the Act. This method made it impossible for the board to recoup the costs, as each requester is entitled to two hours free search time. An extension of the 30 days is only permitted when a board is faced with one big request. In response to their experience with the potential abuse permissible under the current legislation, this small board felt compelled to hire a part-time FOI co-ordinator in 1993.(8)

Processing 100 requests within 30 days is also unrealistic, yet there is no provision in the Act allowing for a board to request additional time to respond when it is inundated with a large number of requests. In addition there is no provision in the Act allowing a board to treat individuals (who are all members of the same association) as "a group" in order to recover the costs of responding to their collective requests. There is no way for a school board to predict accurately when or if it will be faced with a large number of requests at one time. The Act

contains no relief for boards which have a sudden influx of requests, or who are faced with an increased workload without warning. Statutory amendment is necessary to address the potential avenues of abuse that currently exist. Since it is difficult to plan for adequate staff and resources, the writer concurs with O.P.S.B.A.'s recommendation that the Standing Committee should consider amending the legislation to permit time extensions for boards who experience an unusual number of requests at one time, and also an amendment to allow boards to treat requests from individuals in coalitions as one request for the purposes of cost recovery.

The costliness of compliance with the Act is further exacerbated by the exceptions to the user-pay principle.<sup>(9)</sup> School boards are expected to absorb the costs involved in examining and severing documents, preparing indices and drafting complicated decision letters. In addition, requests for someone's own personal information must be processed for free even if the request is so broad as to include "all personal information about me held by the board." In the event of longtime employees, former employees or existing staff who are involved in litigation with the board, the amount of documentation retained by a board could be significant. It would also amount to a horrendous task to locate, sever, copy and release the documents within the 30 day time period. Since the cost of access to one's own personal information can not be passed onto the requester, the taxpayers in general bear the cost of that single individual's inquiry. Historically, solicitors retained by clients in civil litigation matters would obtain written authorizations from their clients enabling them to secure payroll information and attendance records, etc, from their current or former employers, but always on the understanding they were prepared to bear the associated costs. Under the Act cost recovery for receipt of one's own personal information would not appear to be a valid one.

Furthermore, it is not a valid defence that most of the documents request-

ed are already in the requester's possession. This results in duplication. The current Act also permits commercial entities to obtain information which they subsequently use for their own business purposes. Taxpayers should not be subsidizing requests for information that are used for commercial profit.

O.P.S.B.A. has recommended that loopholes in the user-pay system could be resolved by permitting boards to charge for time spent reviewing records, making a decision and preparing a decision letter. In addition it was recommended by O.P.S.B.A. that even individuals seeking their own personal information should be granted a maximum of two hours free search time, and thereafter the fees applicable to general records would apply. (10) With respect to requests for information to be used for commercial purposes, such individuals or entities should be made to pay the full costs associated with such requests.

The thesis survey results revealed that although 44% of boards had issued fee estimates, only a few boards were successful in collecting any fees. Most significantly, the amount of monies recovered were minimal. (11) The time required and the difficulty in providing an accurate fee estimate was cited by several boards as a major flaw in the legislation. The problem is further aggravated by the fact that any person can challenge a fee. Possessing Canadian citizenship is not a prerequisite to making a request or launching an appeal. In the event of an appeal of the fee, the Commissioner requires school boards to bear the burden of proof in justifying the fee. This entails producing affidavit evidence, usually with the assistance of legal counsel. In reviewing the orders in Chapter 6 it would appear that boards which bore the time and expense to defend their fees were rewarded with only a mixed victory -- while the fees were not eliminated entirely, most of the boards were subsequently issued orders reducing the amounts of fees chargeable. Ironically even after preparing the fee estimate and submitting it to challenge, the requester may decide not to obtain the documentation, so the order re-affirming the payment of fees becomes worthless. There is



no cost recovery for the preparation of the fee estimate or for defending its legitimacy before the Commissioner. Instead the taxpayers at large pay for this time and the related costs. Due to the expense, O.P.S.B.A. recommends that appeals involving less than \$1,000 be resolved by telephone rather than the preparation of affidavits.(12)

The questionnaire comments also concur with O.P.S.B.A.'s remarks that the Act is costly because of voluminous and frivolous requests.(13) Unlike other Ontario statutes (14), there is no provision in the current MFIPPA to deal with "nuisance requests" or requests deemed to be frivolous or vexatious. The absence of such a provision threatens the integrity of the Act and frustrates boards which are trying to fulfill their legitimate responsibilities under the Act.

There is a need to look for ways to improve the administration of the Act so that it may be more cost effective, efficient and fair to all parties involved in the process. It is also vital that such amendments facilitate understanding of the Act in its application within the context of school boards. The FOI co-ordinator at one mid-sized board expressed her frustration with the current legislation as follows: "Once again we have been given a piece of legislation developed to create a very defined problem with little or no research done to look at any potential problems its interpretation may create. The Commissioner's answer to an interpretation question? Take it to court! More legal costs from the taxpayers' pockets!"(15) While minimizing the need for judicial intervention and avoiding the use of municipal levies for legal battles is a legitimate argument, it is still essential that the Act retain the opportunity for decisions of the Commissioner's Office to be reviewed by the courts. Any introduction of a privative clause would insulate the Commissioner's Office from the judicial review process, even if an error of fact or law, or both, was made. (16) It would also undermine the legal and procedural accountability and credibility of the Commissioner's Office.

The legislative review process also provides the opportunity to assess the

need for revising the Act to exclude the application of certain provisions of the Act to school boards. At the same time corresponding amendments to the Education Act could be introduced to handle access and privacy issues that are specific to school boards. Several boards indicated that there was a need for clarification about the rights of 16 and 17-year-old students.

As educators, school boards handle personal information about students on a daily basis. Since the Act restricts the collection, retention, use and disclosure of personal information, a number of current practices need to be re-assessed. In the school context, does this mean a student's A+ essay cannot be posted on a hallway bulletin board? Are school boards violating the Act when they permit individual pictures and class photos to be included in such publications as school year books? Should schools be prohibiting the community media from coverage of school sporting events, since articles often report the name, age and school grade of participants? There is an absence of answers to these questions in the Act. If legislative intervention is required to protect student privacy to such an extent as contemplated by the current Act, then amendments to the Education Act, a law specially designed with the unique needs, circumstances and functions of school boards in mind, would be more appropriate than applying the FOI legislation to students.(17)

In its submissions O.P.S.B.A. also identified the problem that boards are forced to respond to privacy or "compliance" investigation for which the Commissioner has no jurisdiction to authorize an investigation. Despite the absence of statutory authority to investigate allegations that personal information was improperly used or disclosed, the Commissioner devotes a significant part of his resources and staff to that very activity. The result is that school boards are forced to bear the expense of participating in and responding to these unnecessary, if not "illegal", investigations. Furthermore, the decisions rendered in these compliance investigations often have far-reaching implications for employment

and educational matters, which are not within the expertise of those persons making the decision. Consequently, O.P.S.B.A. recommends the Commissioner's practice in this area be examined to prevent public funds being expended in this way.(18)

This thesis set out to explore whether or not the current MFIPPA legislation was suitable for school boards. Based on the value framework set out in Chapter 1 the Act would appear to have many inadequacies. In determining the suitability of the current legislation one needs to examine the Act and those bodies it regulates in light of the values of accountability, neutrality, efficiency, effectiveness and integrity. Has the FOI legislation improved the overall accountability of school boards? On the positive side, a few boards suggested that the Act has forced them to clean up their own files, to tighten up records management and to examine their archives. However, is there really any way of knowing with a high degree of certainty what records really exist out there, especially in the very large school boards, where there are numerous satellite offices and schools under their jurisdiction? In light of the admitted short-staffing at all boards, what likelihood is there that sufficient priority and resources will be given to ensure proper records management in the future? Has the mere passage of freedom of information legislation necessarily promoted greater openness in local government? If the public is concerned about holding elected school officials and administration accountable for the efficient and effective use of public funds, do they want undue staff time and taxpayers' dollars used to answer nuisance requests for huge amounts of information? Should municipal levies be used to respond to requests from isolated members of the community or from commercial entities who could independently profit from the information? An amendment to ensure that the cost of voluminous or wasteful requests is borne by the individuals responsible for them, and not by the taxpayers collectively, would be a step in the right direction.

The lack of sufficient staff who are both knowledgeable and comfortable with the legislation is a major obstacle. The current reduction in provincial funding for school boards had made it even more difficult for boards to justify hiring additional staff to specialize in and exclusively deal with responding to individual requests for information. Yet the Act made an assumption that new staff would be hired. For the most part the number of FOI requests received by most boards would not in itself support the need for additional staff. However, FOI issues are intricately related to the establishment and management of a proper record-keeping system which would require full-time employees to audit records and operating practices. In addition, for those boards that have experienced FOI requests, the details and time needed to comply with the legislation indicate that expert assistance is needed. The complexity and procedural steps in the process are also cumbersome to an efficient and timely response. Any delays in responding within the required time period, even if for legitimate reasons, erode trust in the administration of school boards.

Overall the results of the questionnaire and comments voiced by those persons responsible for implementing the legislation within school boards confirms that the Act is not suitable in its present form. In the preceding chapters an outline of the historical development of FOI legislation was given, but many of those factors do not relate to local government. A review of the Commissioner's orders illustrates the complexity of the Act and the current confusion about how to apply it some very practical situations within school boards. This chapter has highlighted a number of concerns and corresponding recommendations. Since it is most unlikely the legislation will be revoked, the review process provides a wonderful opportunity to correct the problems created by the current wording in the Act. It is hoped that the Standing Committee will consider the many helpful suggestions offered by school boards to improve the legislation for the mutual

benefit of those bodies that must conform to the Act, and those persons who choose to use the Act.

The outcome of the review process is even more crucial in light of Commissioner Tom Wright's recommendations to the Standing Committee urging the extension of the legislation to cover hospitals, universities, social service agencies and professional governing bodies, all on the basis it is in the public interest to make these key organizations more readily accountable. Perhaps a Task Force should be established to review whether or not the public really wants or require the extension of this legislation to any other public entities. In the meantime the necessary revisions can be made to MFIPPA based on what has been learned from the application of the Act to local levels of government like school boards.

## **ENDNOTES TO CHAPTER 8:**

- 1) School boards usually passed a bylaw designating the Chair or the entire Board of Trustees as the "Head", and then passed a second bylaw delegating the practical responsibilities to the Director of Education or to whomever he/she deemed appropriate to carry out the functions under the Act.
  
- 2) Aside from the Education Act, R.S.O. 1990, c. E.2, Ontario school boards are affected by a host of other provincial and federal legislation, inclusive of but not limited to the following: Canadian Charter of Rights and Freedoms (being Part 1 of the the Constitution Act, 1982); Child and Family Services Act, 1984, S.O. 1984, c.55; Criminal Code of Canada, R.S.C 1985, c. C-46; Human Rights Code, 1981, S.O. 1981, c.53; Immigration Act, S.C. 1976-77, c.52; Immunization of School Pupils Act, 1982, S.O. 1982, c.41; Judicial Review Procedure Act, R.S.O. 1990, c.J.1; Juvenile Delinquents Act, R.S.C. 1970, c.J.-3; Laboratory and Specimen Collection Centre Licensing Act, R.S.O. 1990, c.L.1; Provincial Offences Act, R.S.O. 1990, c.P.33; Public Inquiries Act, R.S.O. 1990, c. P.41; School Boards and Teachers Collective Negotiations Act, R.S.O. 1990, c. S.2; Smoking in the Workplace Act, 1989, S.O. 1989, c. 48; Statutory Powers Procedure Act, R.S.O. 1990, c. S.22; Teaching Profession Act, R.S.O. 1990, c.T.2; Trespass to Property Act, R.S.O.1990 c. T.21; Young Offenders Act, R.S.C 1985, c. Y.1 and Young Offenders Implementation Act, 1984, S.O. 1984, c.19..
  
- 3) The video prepared by the government of MFIPPA can be obtained by contacting the Freedom of Information and Privacy Branch, Management Board Secretariat, 101 Bloor Street West, Suite 802, Toronto, Ontario M5S 1P7 or (416) 327-2187. Initially copies were distributed free of charge, but availability may now be limited. However, most area libraries were provided with a copy for community viewing and use.

- 4) While most boards only sent one or two persons for training, six of the fifty boards reported sending between 40 and 100 or more representatives for training prior to the Act taking force and effect in January, 1991. Three of these six boards were categorized as large school boards.
- 5) A survey comment made by a FOI co-ordinator of a large board who agreed to participate in the research on the understanding that his or her identity would not be disclosed.
- 6) A real life example provided by a small board in Ontario in response to the questionnaire section dealing with administrative concerns with the current Act.
- 7) Ontario Public School Boards' Association, "Comments on the MFIPPA", Submission to the Standing Committee on the Legislative Assembly dated January 20th, 1994, at page 2.
- 8) A story related by a FOI co-ordinator of a small board, on the condition of anonymity. This real life example of loopholes in the Act illustrates the need for reform.
- 9) A major problem identified by O.P.S.B.A. and included in their Submission to the Standing Committee in the Legislative Assembly dated January 20th, 1994 at pages 5-6.
- 10) Ibid, p.5.
- 11) Recovery of fees for disclosure costs was infrequent and even when successful were so minimal as to be inconsequential in light of the inherent administrative costs for complying with the Act. The amount of fees recovered ranged from \$25 to \$500 amongst the fifty respondents.

12) O.P.S.B.A. Submission to the Standing Committee, January 20th, 1994, at page 6.

13) Ibid., pages 6-10.

14) There are provisions in other Ontario statutes, such as the Courts of Justice Act, R.S.O. 1990, c. C.43; the Ombudsman Act, R.S.O. 1990, c. O.6; and the Human Rights Act, R.S.O. 1990, c. H.19, which address the issue of dealing with frivolous or vexatious complaints.

15) Survey comments by a FOI co-ordinator at a mid-sized Ontario board, whose candid comments were obtained on the condition no reference to identify the board would be made in this thesis.

16) A privative clause limits the court's ability to review the decision of tribunals acting within its jurisdiction, even if an error of fact or law, or both, was made.

17) A suggestion recommended by O.P.S.B.A. at page 12 of its Submission to the Standing Committee of the Legislative Assembly, dated January 20th, 1994.

18) A suggestion recommended by O.P.S.B.A. at pages 13 and 14 of its Submission to the Standing Committee of the the Legislative Assembly, dated January 20th, 1994.



## **APPENDIXES**

Appendix A: Questionnaire Sent to School Board Information and Privacy Coordinators

Appendix B: Ontario Regulation 517/90, The Ontario Gazette

Appendix C: Organizational Chart of the Office of the Information and Privacy Commissioner/Ontario

Appendix D: Table of Concordance Cross Referencing Provisions in MFIPPA and FIPPA

Appendix E: Sectional Index for MFIPPA

Appendix F: Section 266 of the Education Act, R.S.O. 1990, c. E.2.

Appendix G: Section 16 of the Divorce Act, R.S.C. 1985 c.3 (2nd Suppl.)

Appendix H: Section 20 of the Children's Law Reform Act, R.S.O. 1990, c. C.12.

Appendix I: Section 207 of the Education Act, R.S.O. 1990, c. E.2.

Appendix J: Southam Inc. (1991) 5 Ontario Reports (3d) 726, Ontario Court (General Division) Divisional Court, May 16, 1991.

Appendix K: Chart 1: Access to Information Orders Involving School Boards in 1992

Appendix L: Chart 2: Privacy Investigation Reports Involving School Boards in 1992

Appendix M: Chart 3: Access to Information Orders Involving School Boards in 1993

Appendix N: Chart 4: Access to Information Orders Involving School Boards in 1994

Appendix O: List of Members of Ontario Public School Boards' Association

Appendix P: Summary of O.P.S.B.A. Recommendations to Standing Committee

Appendix Q: The Municipal Freedom of Information and Protection of Privacy Act, 1989. R.S.O. 1990, Chapter M.56. Toronto: Queen's Printer of Ontario.

**QUESTIONNAIRE FOR SCHOOL BOARD**  
**INFORMATION & PRIVACY COORDINATORS**

The objective of this questionnaire is to gather data for the purposes of completing a Masters Thesis paper on "The Municipal Freedom of Information & Protection of Individual Privacy Act: An Analysis of its Application to School Boards". Your assistance in answering the following questions is most appreciated. Please return your response by November 19th, 1993 in the enclosed, self-addressed, stamped envelope.

Name of School Board: \_\_\_\_\_ Total No. of staff \_\_\_\_\_

Population of Board's Jurisdiction: \_\_\_\_\_ Total No. of students: \_\_\_\_\_

**(A) Preliminary Steps for Complying with the Act**

1. Did you have a Board Motion appointing a **"Head"** as required by the Act?  
 Yes \_\_\_\_\_ No \_\_\_\_\_ (If so, please attach a copy)
2. What date was it passed? \_\_\_\_\_
3. Was the Director of Education appointed the "Head"? Yes \_\_\_\_\_ No \_\_\_\_\_
4. Were the duties of the Head **delegated** to a Freedom of Information Coordinator or a Committee? Yes \_\_\_\_\_ No \_\_\_\_\_ (Please circle correct response)
5. Did your Board create any of the following to assist in handling access and privacy requests under the Act?
  - Policy & Procedures Manuals? Yes \_\_\_\_\_ No \_\_\_\_\_
  - Pamphlets? Yes \_\_\_\_\_ No \_\_\_\_\_
  - Videos? Yes \_\_\_\_\_ No \_\_\_\_\_
6. Has your Board prepared a **directory** listing the types of records held by your institution in accordance with section 25 of the Act? Yes \_\_\_\_\_ No \_\_\_\_\_ (Attach copy)

**(B) Staffing**

1. Were **new staff hired** to implement the requirements of the Act? Yes \_\_\_\_\_ No \_\_\_\_\_
2. If so, how many? \_\_\_\_\_ Are the new staff full-time or part-time? \_\_\_\_\_
3. Alternatively, were **existing staff** given responsibilities to carry out the requirements of the Act? Yes \_\_\_\_\_ No \_\_\_\_\_

4. Were existing staff given the task of handling requests to administer the Act?

Yes \_\_\_\_\_ No \_\_\_\_\_

5. If yes, how many existing staff were given this responsibility? \_\_\_\_\_

6. When did you assume the position of Freedom of Information Coordinator in your institution? \_\_\_\_\_ (state date)

7. What level of management is the Coordinator's position? \_\_\_\_\_

8. Administratively, to whom does the Coordinator report? \_\_\_\_\_

9. Is the administration of the Act the Coordinator's only responsibility, or do you have additional responsibilities unrelated to the administration of the Act? (Explain briefly)

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### **(C) Staff Orientation & Training**

1. Were staff sent for **training prior to** January 1st, 1991? Yes \_\_\_\_\_ No \_\_\_\_\_

2. How many staff were trained? \_\_\_\_\_

3. Were training or informational sessions provided to the following Board employees?

- Senior School Administrators? Yes \_\_\_\_\_ No \_\_\_\_\_

- Principals and Vice-Principals? Yes \_\_\_\_\_ No \_\_\_\_\_

- Human Resource Personnel? Yes \_\_\_\_\_ No \_\_\_\_\_

- Teachers? Yes \_\_\_\_\_ No \_\_\_\_\_

- Support Staff? Yes \_\_\_\_\_ No \_\_\_\_\_

4. Who provided the staff training? \_\_\_\_\_

5. How would you rate your Board staff's **awareness** of the legislation?

Excellent \_\_\_\_\_ Good \_\_\_\_\_ Fair \_\_\_\_\_ Poor \_\_\_\_\_

6. How would you rate your Board staff's **understanding** of the legislation?

Excellent \_\_\_\_\_ Good \_\_\_\_\_ Fair \_\_\_\_\_ Poor \_\_\_\_\_

### **(D) Number of Requests**

1. Since January 1st, 1991 has your Board received any written requests under the Freedom of Information Act? Yes \_\_\_\_\_ No \_\_\_\_\_

2. How many **separate requests** have you received to date? \_\_\_\_\_

3. How many different persons were requesters (or were some requests made by the same person)? \_\_\_\_\_
4. Of the requests received, how many from staff? \_\_\_\_\_ trustees? \_\_\_\_\_ media? \_\_\_\_\_ taxpayers / association? \_\_\_\_\_ parents? \_\_\_\_\_ students? \_\_\_\_\_ Other? \_\_\_\_\_

**(E) Types of Requests**

1. How many of the **requests** for access to information dealt with the following subjects:
- a. information about employees \_\_\_\_\_
  - b. information about students \_\_\_\_\_
  - c. information about Board programs \_\_\_\_\_
  - d. information about Trustees \_\_\_\_\_
  - e. information about third parties \_\_\_\_\_
2. Which **exemptions** does your Board cite most frequently for denying information?
- a. personal information \_\_\_\_\_
  - b. third party information \_\_\_\_\_
  - c. legal opinion \_\_\_\_\_
  - d. other \_\_\_\_\_

**(F) Fee Estimates, Waivers & Collection**

1. Have you provided any fee estimates for the cost of disclosing records? Yes \_\_\_ No \_\_\_
2. What, if any, problems did you encounter in providing the estimate? \_\_\_\_\_
- 
3. For how many of the requests have you collected fees for disclosure? \_\_\_\_\_
4. State the total amount of fees collected in 1991? \_\_\_\_\_ (estimate if necessary)  
in 1992 ? \_\_\_\_\_  
in 1993 ? \_\_\_\_\_ (to date)
5. How many requests were made for fee waivers? \_\_\_\_\_
6. How many fee waivers were granted by your institution? \_\_\_\_\_
7. Were the fee waivers granted in whole or in part? \_\_\_\_\_

**(G) Barriers to Implementing the Legislation**

1. Have you experienced any difficulty in processing the access requests within the 30 day time period set out in the Act? Yes \_\_\_\_\_ No \_\_\_\_\_

2. In complying with the Act have you experienced any administrative concerns?

(For example, interpreting or applying the legislation; record-keeping; dealing with the number of requests; estimating or collecting fees; abuse by individuals filing numerous or vexatious requests; lack of sufficient staff, etc.) If so, please briefly explain below.

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**(H) The Appeal Process**

1. Have any of the requests for information which you have denied been appealed to the Freedom of Information Commission in Toronto? \_\_\_\_\_ If so, how many? \_\_\_\_\_

2. Have decisions been rendered by the Commission to date ? \_\_\_\_\_

3. If so, state the order numbers \_\_\_\_\_

4. How many decisions are outstanding at the time? \_\_\_\_\_

5. Briefly state the main issue in the outstanding decision(s): \_\_\_\_\_

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**Thank you for your co-operation in completing this survey.**

**If you have any questions feel free to contact :**

**Brenda Stokes Verworn, 95 Pine Street North, Thorold, Ont. L2V 2P3**

**Home (905) 227 - 6314 Office (905) 641-1550 ext. 2273**

Date completed survey: \_\_\_\_\_ Phone Number: \_\_\_\_\_

Name of person completing survey (please print): \_\_\_\_\_

Position of person completing survey: \_\_\_\_\_

**Please Note: The results of this questionnaire will be incorporated into the thesis but no reference to any specific School Board will be made.**

O. Reg. 517/90

THE ONTARIO GAZETTE

6255

**MUNICIPAL FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY  
ACT, 1989**

O. Reg. 517/90.

General.

Made—August 28th, 1990.

Filed—August 29th, 1990.

**REGULATION MADE UNDER THE  
MUNICIPAL FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY  
ACT, 1989**

**GENERAL**

1. A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution. O. Reg. 517/90, s. 1.

2.—(1) A head who provides access to an original record must ensure the security of the record.

(2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.

(3) A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it. O. Reg. 517/90, s. 2.

3.—(1) Every head shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected.

(2) Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it.

(3) Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected. O. Reg. 517/90, s. 3.

4.—(1) An institution is not required to give notice of the collection of personal information to an individual to whom it relates if the head complies with subsection (2) and if,

- (a) providing notice would frustrate the purpose of the collection;
- (b) providing notice might result in an unjustifi-

able invasion of another individual's privacy; or

- (c) the collection is for the purpose of determining suitability or eligibility for an award or honour.

(2) For the purpose of subsection (1), the head shall make available for public inspection a statement describing the purpose of the collection of personal information and the reason that notice has not been given. O. Reg. 517/90, s. 4.

5. Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal. O. Reg. 517/90, s. 5.

6. The following are the fees that shall be charged for the purposes of subsection 45 (1) of the Act:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For floppy disks, \$10 for each disk.
- 3. For manually searching for a record after two hours have been spent searching, \$7.50 for each fifteen minutes spent by any person.
- 4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.
- 5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each fifteen minutes spent by any person.
- 6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution. O. Reg. 517/90, s. 6.

7.—(1) If a head gives a person an estimate of an amount payable under the Act and that estimate is \$25 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before completing the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived. O. Reg. 517/90, s. 7.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment. O. Reg. 517/90, s. 8.
9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record. O. Reg. 517/90, s. 9.
- 10.—(1) The following are the terms and conditions relating to security and confidentiality that a person is required to agree to before a head may disclose personal information to that person for a research purpose:
  1. The person shall use the information only for a research purpose set out in the agreement or for which the person has written authorization from the institution.
  2. The person shall name in the agreement any other persons who will be given access to personal information in a form in which the individual to whom it relates can be identified.
  3. Before disclosing personal information to other persons under paragraph 2, the person shall enter into an agreement with those persons to ensure that they will not disclose it to any other person.
  4. The person shall keep the information in a physically secure location to which access is given only to the person and to the persons given access under paragraph 2.
  5. The person shall destroy all individual identifiers in the information by the date specified in the agreement.
  6. The person shall not contact any individual to whom personal information relates directly or indirectly without the prior written authority of the institution.
  7. The person shall ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.
  8. The person shall notify the institution in writing immediately if the person becomes aware that any of the conditions set out in this section have been breached.
- (2) An agreement relating to the security and confidentiality of personal information to be disclosed for a research purpose shall be in Form 1. O. Reg. 517/90, s. 10.
11. A request for access to a record under Part II of the Act or for access to or correction of personal information under Part III of the Act shall be in Form 2 or in any other written form that specifies that it is a request made under the Act. O. Reg. 517/90, s. 11.
12. This Regulation comes into force on the 1st day of January, 1991.

## Form 1

*Freedom of Information and Protection of Privacy Act, 1987*  
*Municipal Freedom of Information and Protection of Privacy Act, 1989*

## AGREEMENT

This agreement is made between ....., referred to  
 name of researcher

below as the researcher, and ....., referred to  
 name of institution

below as the institution.

The researcher has requested access to the following records that contain personal information and are in the custody or under the control of the institution: (Describe the records below)

.....  
 .....  
 .....

The researcher understands and promises to abide by the following terms and conditions:

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1. The researcher will not use the information in the records for any purpose other than the following research purpose unless the researcher has the institution's written authorization to do so: (Describe the research purpose below)

.....  
.....  
.....

2. The researcher will give access to personal information in a form in which the individual to whom it relates can be identified only to the following persons: (Name the persons below)

.....  
.....  
.....

3. Before disclosing personal information to persons mentioned above, the researcher will enter into an agreement with those persons to ensure that they will not disclose it to any other person.

4. The researcher will keep the information in a physically secure location to which access is given only to the researcher and to the persons mentioned above.

5. The researcher will destroy all individual identifiers in the information by .....  
(date)

6. The researcher will not contact any individual to whom personal information relates directly or indirectly without the prior written authority of the institution.

7. The researcher will ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.

8. The researcher will notify the institution in writing immediately upon becoming aware that any of the conditions set out in this agreement have been breached.

Signed at ..... this ..... day of ....., 199.....

.....  
Researcher

Name: .....

Address: .....

.....  
Telephone: .....

.....  
Representative of Institution

Name: .....

Position: .....

Institution: .....

Address: .....

.....

.....




Telephone: .....

O. Reg. 517/90, Form 1.



## Form 2

*Municipal Freedom of Information and Protection of Privacy Act, 1989*

Request for:		Name of Institution request made to:	
<input type="checkbox"/> Access to General Records <input type="checkbox"/> Access to Own Personal Information <input type="checkbox"/> Correction of Own Personal Information			
If request is for access to, or correction of, own personal information records:			
Last name appearing on records: <input type="checkbox"/> same as below or 			
Details			
Last Name	First Name	Middle Name	<input type="checkbox"/> Mr. <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms. <input type="checkbox"/> Miss
Address (Street/Apt. No./P.O. Box No./R.R. No.)		City or Town	Province
Postal Code	Telephone Number(s)	Area Code	Area Code
	Day 		Evening 
Detailed description of requested records, personal information records or personal information to be corrected. (If you are requesting access to or correction of your personal information, please identify the personal information bank or record containing the personal information, if known)			

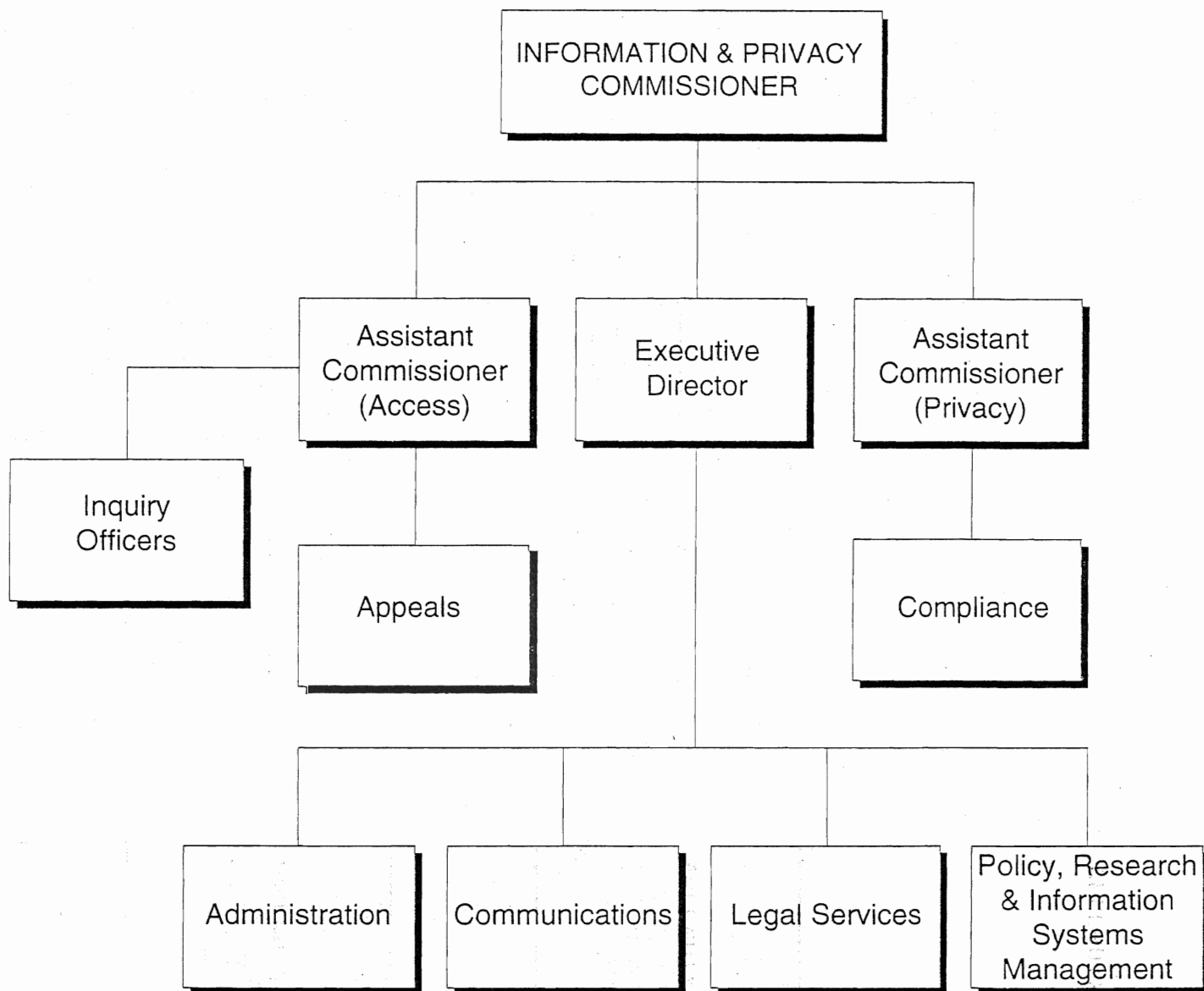
Note: If you are requesting a correction of personal information, please indicate the desired correction and, if appropriate, attach any supporting documentation. You will be notified if the correction is not made and you may require that a statement of disagreement be attached to your personal information.

Preferred method of access to records:	Signature	Date
<input type="checkbox"/> Examine Original <input type="checkbox"/> Receive Copy		Day Month Year
For Institution Use Only		
Date received	Request Number	Comments
Day Month Year		

Personal information contained on this form is collected pursuant to the Freedom of Information and Protection of Privacy Act and will be used for the purpose of responding to your request. Questions about this collection should be directed to the Freedom of Information and Privacy Coordinator at the Institution where the request is made.

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O. Reg. 517/90, Form 2.



## TABLE OF CONCORDANCE

This Table of Concordance cross references comparable sections in Ontario's *Freedom of Information and Protection of Privacy Act, 1987* with the *Municipal Freedom of Information and Protection of Privacy Act*. The wording of subsections is not always identical.

Provincial Act	Municipal Act	Provincial Act	Municipal Act	Provincial Act	Municipal Act
1(a)	1(a)	14(1)	8(1)	24(1)	17(1)
1(b)	1(b)	14(2)	8(2)	24(2)	17(2)
		14(3)	8(3)	24(3)	-
2(1)	2(1)	14(4)	8(4)	24(4)	-
2(2)	2(2)	14(5)	8(5)	24(5)	-
2(3)	-			-	18(1)
2(4)	-	15	9(1)		
2(5)	3(1),(2),(3)	-	9(2)	25(1)	18(2)
				25(2)	18(3)
3	-	16	-	25(3)	18(4)
4	-			25(4)	18(5)
5	-	17(1)	10(1)		
6	-	17(2)	10(2)	26	19
7	-				
8	-	18(1)	11	27(1)	20(1)
9	-	-	11(h),(i)	27(2)	20(2)
		18(2)			
10(1)	4(1)			28(1)	21(1)
10(2)	4(2)	19	12	28(2)	21(2)
				28(3)	21(3)
11(1)	5(1)	20	13	28(4)	21(4)
11(2)	5(2)			28(5)	21(5)
11(3)	5(3)	21(1)	14(1)	28(6)	21(6)
11(4)	5(4)	21(2)	14(2)	28(7)	21(7)
		21(3)	14(3)	28(8)	21(8)
-	6(1),(2)	21(4)	14(4)	28(9)	21(9)
		21(4)(c)	-		
12(1)	-	21(5)	14(5)	29(1)	22(1)
12(2)	-			-	22(1)(a)(ii)
		22	15	29(2)	22(2)
13(1)	7(1)			29(3)	22(3)
13(2)	7(2)	23	16	29(4)	22(4)
13(3)	7(3)				

Provincial Act	Municipal Act	Provincial Act	Municipal Act	Provincial Act	Municipal Act
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30(2)	23(2)	46(2)	35(2)	60(b)	-
30(3)	23(3)	46(3)	-	60(c)	47(b)
				60(d)	47(c)
31	24(1)	47(1)	36(1)	60(e)	47(d)
-	24(2)	47(2)	36(2)	60(f)	47(e)
				60(g)	47(f)
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		48(2)	37(2)	60(i)	47(h)
33	-	48(3)	-	60(j)	47(k)
		48(4)	37(3)	60(k)	47(l)
34(1)	26(1)			-	47(i)
34(2)	26(2)	49(a)(b)(c)	38	-	47(j)
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		50(3)	39(3)	62(3)	-
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for Ontario's

## *Municipal Freedom of Information and Protection of Privacy Act*

**Tom Wright  
Commissioner  
April 1994**

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38(b)	M-3, M-22, M-41, M-42, M-48, M-49, M-52, M-54, M-56, M-63, M-75, M-82, M-84, M-88, M-95, M-110, M-122, M-125, M-127, M-146, M-155, M-157, M-158, M-167, M-170, M-180, M-199, M-211, M-212, M-215, M-240
38(c)	M-82, M-132, M-144
39(2)	M-156
39(3)	M-184
41(4)	M-59
41(13)	M-184
42	M-151
43	M-53, M-159, M-160
44	M-59
45(1)	M-66, M-103, M-139, M-166, M-168, M-171, M-203, M-218
45(1)(a)	M-66, M-139, M-163, M-171
45(1)(b)	M-66, M-139, M-163, M-171, M-236
45(1)(c)	M-66, M-139, M-163

45(1)(d)	M-66, M-163
45(3)	M-171
45(4)	M-66, M-166
45(4)(a)	M-218, M-220
45(4)(b)	M-218, M-220, M-228, M-229
45(4)(c)	M-66, M-220, M-228, M-229
45(4)(d)	M-66, M-218, M-220
45(5)	M-218, M-236
45(6)	M-163, M-171
46	M-156
49(1)	M-107, M-108
52	M-127
53	M-181
54	M-50
54(a)	M-50, M-51, M-205, M-206
54(c)	M-100, M-104

**Source:** THE EDUCATION ACT R.S.O. 1990 c. E.2*Pupil Records*

## Definition

**266.**—(1) In this section, except in subsection (12), "record", in respect of a pupil, means a record under clause 236 (d).

## Pupil records privileged

(2) A record is privileged for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,

(a) subject to subsections (2a), (3) and (5), is not available to any other person; and

(b) except for the purposes of subsection (5), is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record,

without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil.

## Information to medical officer of health

(2a) The principal of a school shall, upon request by the medical officer of health serving the area in which the school is located, give that medical officer of health the following information in respect of pupils enrolled in the school:

1. The pupil's name, address and telephone number.
2. The pupil's birthdate.
3. The name, address and telephone number of the pupil's parent or guardian.

## Right of parent and pupil

(3) A pupil, and his or her parent or guardian where the pupil is a minor, is entitled to examine the record of such pupil.

## Idem

(4) Where, in the opinion of a pupil who is an adult, or of the parent or guardian of a pupil who is a minor, information recorded upon the record of the pupil is,

(a) inaccurately recorded; or

(b) not conducive to the improvement of instruction of the pupil,

such pupil, parent or guardian, as the case may be, may, in writing, request the principal to correct the alleged inaccuracy in, or to remove the impugned information from, such record.

## Reference where disagreement

(5) Where the principal refuses to comply with a request under subsection (4), the pupil, parent or guardian who made the request may, in writing, require the principal to refer the request to the appropriate supervisory officer who shall either require the principal to comply with the request or sub-

mit the record and the request to a person designated by the Minister, and such person shall hold a hearing at which the principal and the person who made the request are the parties to the proceeding, and the person so designated shall, after the hearing, decide the matter, and his or her decision is final and binding upon the parties to the proceeding.

## Use re further education or employment

(6) Nothing in subsection (2) prohibits the use by the principal of the record in respect of a pupil to assist in the preparation of,

(a) a report required by this Act or the regulations; or

(b) a report,

(i) for an educational institution or for the pupil or former pupil, in respect of an application for further education, or

(ii) for the pupil or former pupil in respect of an application for employment,

where a written request is made by the former pupil, the pupil where he or she is an adult, or the parent or guardian of the pupil where the pupil is a minor.

## Information for Minister or board

(7) Nothing in this section prevents the compilation and delivery of such information as may be required by the Minister or by the board.

## No action re content

(8) No action shall be brought against any person in respect of the content of a record.

## Testimony re content

(9) Except where the record has been introduced in evidence as provided in this section, no person shall be required in any trial or other proceeding to give evidence in respect of the content of a record.

## Secrecy re contents

(10) Except as permitted under this section, every person shall preserve secrecy in respect of the content of a record that comes to the person's knowledge in the course of his or her duties or employment, and no such person shall communicate any such knowledge to any other person except,

(a) as may be required in the performance of his or her duties; or

(b) with the written consent of the parent or guardian of the pupil where the pupil is a minor; or

(c) with the written consent of the pupil where the pupil is an adult.

## Definition

(11) For the purposes of this section, "guardian" includes a person, society or corporation who or that has custody of a pupil.

THE EDUCATION ACT section 266 cont'd.

Application  
to former  
records

(12) This section, except subsections (3), (4) and (5), applies with necessary modifications to a record established and maintained in respect of a pupil or retained in respect of a former pupil prior to the 1st day of September, 1972.

Use of  
record in  
disciplinary  
cases

(13) Nothing in this section prevents the use of a record in respect of a pupil by the principal of the school attended by the pupil or the board that operates the school for the purposes of a disciplinary proceeding instituted by the principal in respect of conduct for which the pupil is responsible to the principal. R.S.O. 1980, c. 129, s. 237 (2-13).

**Source:** S. 16 THE DIVORCE ACT S. C. 1985 Chapter 3 (Second Supplement)

### COROLLARY RELIEF

*ORDER FOR CUSTODY — Interim order for custody — Application by other person — Joint custody or access — Access — Terms and conditions — Order respecting change of residence — Factors — Past conduct — Maximum contact.*

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

#### 16 History

See s. 15 History.

## Source:

THE CHILDREN'S LAW REFORM ACT R.S.O. 1990, Chapter C.12, section 20.

## CUSTODY AND ACCESS

Father and  
mother enti-  
tled to  
custody

20.—(1) Except as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.

Rights and  
responsibili-  
ties

(2) A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child.

Authority to  
act

(3) Where more than one person is entitled to custody of a child, any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child.

Where  
parents sepa-  
rate

(4) Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement of custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.

Duty of  
separated  
parents

(4a) Where the parents of a child live separate and apart and the child is in the custody of one of them and the other is entitled to access under the terms of a separation agreement or order, each shall, in the best interests of the child, encourage and support the child's continuing parent-child relationship with the other. 1989, c. 22, s. 1.

Access

(5) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

Marriage of  
child

(6) The entitlement to custody of or access to a child terminates on the marriage of the child.

Entitlement  
subject to  
agreement or  
order

(7) Any entitlement to custody or access or incidents of custody under this section is subject to alteration by an order of the court or by separation agreement. 1982, c. 20, s. 1, *part.*

Source: The Education Act, R.S.O. 1990, Chapter E.2, section 207.

*Access to Meetings and Records*

**207. (1) Open meetings of boards.**—The meetings of a board and, subject to subsection (2), meetings of a committee of the board, including a committee of the whole board, shall be open to the public, and no person shall be excluded from a meeting that is open to the public except for improper conduct.

**(2) Closing of certain committee meetings.**—A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

- (a) the security of the property of the board;
- (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
- (c) the acquisition or disposal of a school site;
- (d) decisions in respect of negotiations with employees of the board; or
- (e) litigation affecting the board.

**(3) Exclusion of persons.**—The presiding officer may expel or exclude from any meeting any person who has been guilty of improper conduct at the meeting.

**(4) Inspection of books and accounts.**—Any person may, at all reasonable hours, at the head office of the board inspect the minute book, the audited annual financial report and the current accounts of a board, and, upon the written request of any person and upon the payment to the board at the rate of 25 cents for every 100 words or at such lower rate as the board may fix, the secretary shall furnish copies of them or extracts therefrom certified under the secretary's hand.

but attempted to assess the loss to its shareholders, and then awarded the major portion of the loss (\$15,000) to the now defunct company. Accordingly, quite apart from the nexus problem, I am not satisfied that the respondents made out a case for the quantum of damages assessed by the trial judge. They were arrived at without reference to accepted principles of business or property valuation. For this reason I would not be prepared to allow the cross-appeal of the respondents.

In the result, for the reasons set out above, I would allow the appeal, dismiss the cross-appeal, and substitute a judgment dismissing the plaintiffs' action without disturbing the judgment on the counterclaim. I think that the appellant should have his costs both here and below.

*Appeal dismissed;  
cross-appeal allowed.*

**Southam Inc., Eade and Aubry v. Council of the  
Corp. of the City of Ottawa and Corp. of the City of Ottawa;  
Attorney General for Ontario, intervener**

[Indexed as: Southam Inc. v. Ottawa (City) Council]

Ontario Court (General Division), Divisional Court,  
Desmarais, McKeown and Farley JJ. May 16, 1991\*

Municipal law — By-laws — Violation — Proceedings by municipality — Municipal council holding "retreat" in camera — Whether retreat is informal discussion that may be held in camera or meeting required to be held in public — Retreat a meeting since matters dealt with ordinarily constituting council business and dealt with to move them materially forward — Municipal Act, R.S.O. 1990, c. 302, s. 55.

Courts — Jurisdiction — Mootness — Judicial review application to set aside decision of municipal council to hold retreat in camera — Application heard after retreat completed — Issue not moot.

The Ottawa City Council held a "retreat" at a resort on January 26 and 27, 1989. All Council members were invited to the retreat and except one who was ill, all members attended. Certain staff members also attended. The agenda included many items that were within the scope of matters normally dealt with by Council. Examples of the agenda were an overview of a capital expenditure plan, a consideration of an infrastructure management salary, a review of priorities for the next three years, and a consideration of additional salaries for councillors who were committee heads. The retreat was *in camera* and the applicants' request to attend was refused. The applicants by way of judicial review sought an order to quash and set aside Council's decision on the ground that the retreat was a meeting of Council

\*Released June 26, 1991; received November 20, 1991.

that under the City's procedural by-law and under s. 55 of the *Municipal Act* ought to be in public.

Held, the application should be granted.

*Per McKeown J. (Desmarais and Farley JJ. concurring):* Although the retreat had already been completed, the issue was not moot. A decision would resolve a controversy between the parties that could recur. It was in the public interest to resolve the issue. In any event, even if the application was moot, the court had the discretion to hear it.

*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 38 C.R.R. 232, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 10, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, [1989] 3 W.W.R. 97, *apud*

*Per Farley J. (Desmarais and McKeown JJ. concurring):* The key issue was whether the councillors were requested to attend or did in fact attend a function at which matters ordinarily constituting Council's business were dealt with in such a way as to move the matters materially forward in the overall spectrum of a Council decision. In other words, was the public deprived of the opportunity to observe a material part of the decision-making process? If so, the retreat was not an informal discussion but a meeting that ought to have been in public. It was not relevant that the retreat did not substitute for regularly scheduled meetings and that the retreat was informal and did not occasion the ritual trappings of a formal Council meeting. Based on the material before the court, the retreat was a meeting.

*Southam Inc. v. Hamilton-Yorkville (Regional Municipality) Economic Development Committee* (1988), 61 O.R. (2d) 213, 33 Admin. L.R. 125, 54 D.L.R. (4th) 131, 40 M.P.L.R. 1, 30 O.A.C. 39 (C.A.), *rev'd* (1986), 54 O.R. (2d) 21, 18 Admin. L.R. 234, 32 M.P.L.R. 22, 14 O.A.C. 181 (Div. Ct.) (leave to appeal to S.C.C. refused (1989), 102 N.R. 382, 35 O.A.C. 215); *Vanderkloof v. Leeds and Grenville County Board of Education* (1985), 51 O.R. (2d) 577, 21 Admin. L.R. 36, 20 D.L.R. (4th) 738, 30 M.P.L.R. 290, 11 O.A.C. 145 (C.A.) (leave to appeal to S.C.C. refused (1986), 54 O.R. (2d) 352, 65 N.R. 169, 15 O.A.C. 239), *dis'd*

Statutes referred to

*Canadian Charter of Rights and Freedoms*, s. 2(b)  
*Municipal Act*, R.S.O. 1990, c. 302, ss. 55, 55(1), 58

APPLICATION for judicial review of a municipal council decision.

Neil R. Wilson and R. Hefley, for applicants.

Carey Thomson, for respondents.

M.D. Lepofsky, for intervener.

FARLEY J. (DESMARAI and McKEOWN JJ. concurring) (orally):—These oral reasons should be read in conjunction with the oral reasons of McKeown J. concerning the mootness aspect of this matter.

The applicants sought a judicial review of the decision of Ottawa City Council to hold *in camera* what was termed a "retreat" at the Calabogie Resort on Thursday, January 26 and Friday January 27, 1989. They wished an order in the nature of *certiorari* to quash



and set aside sursion. They took the position that such were meetings of Council, pursuant to s. 8 of Procedural By-Law 384-68, as amended the Corporation of the City of Ottawa and pursuant to s. 51e *Municipal Act*, R.S.O. 1980, c. 302, as amended, ought to be open to the public. Their request to attend the Calabog events on either day was refused — initially by the mayor subsequently by a vote of the councillors attending the ev

The events wactions which emanated from the mayor's office and were or out of Council funds. A number of such events had beer since 1978. All members of Council were invited to attend did but one who was sick. Staff was also in attendance. The day had a detailed structured agenda (for what was term Council caucus"). This agenda dealt with many items whid be within the scope of matters in which Council would rily involve itself. Examples of these Thursday topics be "Overview of 1989-93 Capital Expenditure Plan", "Inicture Management Strategy" and "Review of the Next Thrurs' Priorities by Service Area". These are clearly forward-; matters. Friday was a more restricted event. It was sd to be for the mayor and members of Council only", ah certain staff members were present. The Friday topics wspecified but apparently included presence of councillors at l functions, decorum at Council meetings, relations with Cif, the performance of the then chief administrative officer a question of additional salaries to be paid to councillors who committee heads. Part of the material distributed for tht was termed "Infrastructure Management Strategy: Final P" dated January 17, 1989. It recommended: (1) that Counprove in principle the Infrastructure Management Str; (2) that Council approve the financial action plans for Infrastructure Management Strategy as briefly outlined e Executive Summary; (3) that Council approve the Sewerservice Rate Report; (4) that Council table the Subdivision ledvelopment Charges Reports in order that public consu on these reports may be undertaken and that staff report to the Council with the results of that consultation.

Routing of thocess was said to go initially to the Community Serand Operations Committee, next to the Policy, Prioritie Budgeting Committee and finally, to Council. It appeat this routing was contemplated as taking place some time early February as it was proposed in the

document that a press conference be held in early February to inform the public of the City's intentions concerning infrastructure management and the public be invited to speak to the two committees. For example, part of the report proposed that the City sewage service rate be increased from 9.47 per cent in 1988 to 46.40 per cent in 1989.

Questions were raised by the councillors and some had to be subsequently answered by the staff in writing by memo dated February 2, 1989. These questions included: What is the bottom line for the taxpayer with the City's increases in taxes and charges and the Region's increases in taxes and charges? What is the economic development impact of increasing subdivision and development charges?

At the Friday meeting one specific matter dealt with was that a committee of councillors was struck for the purpose of investigating and reporting on the subject of additional salaries to be paid to councillors who were committee heads. A report of this committee was approved and adopted by Council in September 1989.

Sections 55(1) and 58 of the *Municipal Act* provide:

55.(1) The meetings, except meetings of a committee including a committee of the whole, of every council . . . shall be open to the public and no person shall be excluded therefrom except for improper conduct.

58. If there is no by-law or resolution fixing a place of meeting, a special meeting shall be held at the place where the then last meeting was held, and a special meeting may be either open or closed as in the opinion of the council, expressed by resolution in writing, the public interest requires.

The corresponding sections of By-law 384-68 are:

3(3) The meetings, except meetings of a committee including a Committee of the Whole, shall be open to the public and no person shall be excluded therefrom except for improper conduct.

3(5)(1) A special meeting may be either open or closed as in the opinion of the Council, expressed by resolution in writing, the public interest requires.

It was agreed by all parties that the events were not called as a special meeting.

The respondents rely upon the Court of Appeal decision in *Vanderkloet v. Leeds & Grenville County Board of Education* (1985), 51 O.R. (2d) 577, 20 D.L.R. (4th) 738 [leave to appeal to S.C.C. refused (1986), 54 O.R. (2d) 352n, 65 N.R. 159n], as authority for holding the Calabogie events *in camera*. Dubin J.A. for the court said, in dealing with s. 183(1) [rep. and sub. 1982, c. 32, s. 51] of the *Education Act*, R.S.O. 1980, c. 129 (which is

materially identical to s. 55(1) of the *Municipal Act*, at pp. 586-87 O.R., pp. 747-48 D.L.R.:

With respect, I do not think that the requirement that the meetings of the Board should be open to the public precludes informal discussions among board members, either alone or with the assistance of their staff.

The Court of Appeal allowed the appeal as to the initial judgment that certain resolutions of the Board of Education reorganizing three schools were void. The issue in that case was not whether the public should be allowed into the meetings; but whether the resolutions were void, the Board having met informally at a dinner and then *in camera* before passing the resolutions in a public meeting unattended by the public and thereafter reconfirming that decision at a further public meeting attended by the public after newspaper announcements. This distinction was clearly recognized in *Southam Inc v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee* (1988), 66 O.R. (2d) 213, 54 D.L.R. (4th) 131 (C.A.) [leave to appeal to S.C.C. refused (1989), 102 N.R. 238n, 36 O.A.C. 215n] (see Grange J.A. at p. 219 O.R., pp. 136-37 D.L.R.).

The respondents also suggested that the *Hamilton-Wentworth* case hinged on the lack of definition of "meetings" in that committee's procedural by-law. They contrasted that with their Procedural by-law 384-68 which in s. 1(h) defined "meeting" as follows:

1. In this by-law,

"Meeting" means a meeting of council.

(Emphasis added)

However, this, in essence, appears to be a circular definition which does not advance the matter. It is curious to note that the subsection of the procedural by-law in question, s. 3(3) and the remainder of s. 3, refers to "meeting" without capitalization of the first letter of the word. This comment is made in passing as, in our view, the question should be resolved on a substantive basis rather than one of form. Grange J.A., for the majority in *Hamilton-Wentworth*, said at pp. 217-18 O.R., p. 135 D.L.R.:

The by-law gives no definition of "meeting" but Black's Law Dictionary, 5th ed. (1979), at p. 886 reflects common parlance when it defines "meeting" as: "... an assembling of a number of persons for the purpose of discussing and acting upon some matter or matters in which they have a common interest ...". In the context of a statutory committee, "meeting" should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction. And that is precisely what was being done on that occasion. No matter how the meeting might be disguised by the

use of terms such as "workshop" or the failure to make a formal report, the committee members were meeting to discuss matters within their jurisdiction. What the committee was trying to do was to have a meeting *in camera*, something expressly forbidden under the by-law.

He went on to say at p. 219 O.R., p. 136 D.L.R.:

There is no doubt that members of a committee, meeting informally, can discuss questions within the jurisdiction of the committee privately, but when all members are summoned to a regularly scheduled meeting and there attempt to proceed *in camera*, they are defeating the intent and purpose of council's by-law which governs their procedure.

The respondents then suggested that the fact that the Calabogie events were not substitutes for regularly scheduled meetings was pivotal. However, it would appear that this is rather a question of looking at the essence of the events. Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed: for example, the prayer to commence the meeting or the seating of councillors at a U-shaped table. Neither should it depend entirely on whether the meeting takes place commencing at 2:30 p.m. on the first and third Wednesday of a month or is in substitution for such a Wednesday meeting. The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?

Grange J.A. in *Hamilton-Wentworth* at p. 219 O.R., p. 136 D.L.R., agreed with what Reid J. (dissenting) said in that case in the Divisional Court ((1986), 54 O.R. (2d) 21, 82 M.P.L.R. 232) at p. 27 O.R., p. 290 M.P.L.R.:

I am not comfortable with the fact that the Committee seeks to avoid its own by-law by calling a meeting a workshop. In *Vanderkloet* the court was apparently satisfied that it had sufficient evidence of what went on to be able to decide that the meetings were really informal discussions. Here, as the result of the Committee's failure or refusal to reveal what went on, we do not know. In my opinion, if the Committee hopes to bring its meeting within the protection afforded by *Vanderkloet* it is obliged to reveal enough to enable the court to decide whether or not what occurred was a meeting or an informal discussion within the ambit of *Vanderkloet*.

In this case the respondents indicated that no decisions had been made at the Calabogie events. Clearly, this is not the case with respect to the committee struck then to investigate and report on additional pay for committee heads. It should also be noted that on cross-examination of the Council's representative it

was confirmed that there were no other documents producible beyond what the applicants then had (which were attached to their original material). The applicants were fortunate that they were able to obtain elsewhere the February 2, 1989 memorandum from the chief administrative officer to the mayor and councillors concerning questions raised at the events and subsequent answers. They disclosed this to the respondents at the cross-examination. The subject of notes being taken at the events was then raised but nothing further was submitted to the court. It stretches credibility beyond the breaking point to understand how notes could not have been made at the events, at least by staff, in order to prepare the February 2 memorandum.

At the very least we have, in respect of the Calabogie events, councillors and the mayor meeting with staff: (i) to discuss in a structured way matters which would ordinarily be the subject of Council business, (ii) it would seem in part to make action-taking decisions (committee head pay committee) and, (iii) to materially move along a number of matters vis-à-vis council: (a) agenda items as reflected in the questions raised which were subsequently answered on matters that were on a critical path, with the next step being a press release of the City's intentions in early February, as well as, (b) the future of the chief administrative officer, as to whom steps were taken shortly thereafter to dismiss before he eventually resigned.

It does not seem to us that there has been sufficient disclosure to the court to allow us to conclude with certainty the precise nature of what occurred at the Calabogie events. Unfortunately this must weigh against the respondents in our assessment of whether these events were genuinely informal discussions within the ambit of *Vanderkloet* (as disclosed in that case and thereafter in *Hamilton-Wentworth*) or were in essence truly meetings.

We therefore have concluded that on the basis of the material before us it appears that in essence the Calabogie events were meetings. Taking this view of the matter we find no need to consider the applicants' further arguments based on the *Canadian Charter of Rights and Freedoms* and the alleged infringement of s. 2(b) thereof by the closing of these meetings to the media.

We therefore have determined that the decision of Council to hold the meetings at Calabogie on January 26 and 27, 1989, *in camera* was contrary to By-law 884-68 and s. 55 of the *Municipal Act* and exceeded the jurisdiction of the Council. There is to be an order issued in the nature of *certiorari* to quash and set aside that decision.

McKEOWN J. (DESMARAIS and FARLEY JJ. concurring) (orally):—Mr. Justice Sopinka sets out the doctrine of mootness in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, at p. 353 S.C.R., p. 239 D.L.R.: wherein he states:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

In this application the decision of the court will have the effect of resolving a controversy which may affect the rights of the parties. Subsequent to the initiation of the application there are no events which have occurred which affect the relationship of the parties and therefore a present live controversy exists. The retreat in question terminated January 27, 1989, but there may be future retreats.

Even if the application is moot we choose to exercise our discretion to hear the application, since the facts in question meet the three requirements set out by Mr. Justice Sopinka in *Borowski*, *supra*, at pp. 358-62 S.C.R., pp. 243-46 D.L.R.

In our view there is an unresolved dispute as between the parties which, if not resolved, will perforce ignore judicial economy. Also, the dispute deals with the interpretation of a statute, by-law or the *Canadian Charter of Rights and Freedoms*, which would be in the public interest to resolve, given the potential recurrence of the same problem between the media and municipalities.

*Order accordingly.*

CHART 1: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1992

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-8	M-910080	Halton Bd. of Ed.	March 5, 1992	Tom Wright	ss 14 & 22 s.14(1)(f)&(h) s.14(2) s.14(3)	Volunteers	Access granted to records involving Key Communication Program inclusive of identity of volunteers, correspondence, questionnaires, surveys and program expenses.
M-11	M-910407	Wentworth County Board of Education	April 22, 1992	Tom Wright	s.12	Outside Legal Counsel retained by Board	Upheld Head's decision <u>not</u> to disclose 2 lawyer's letters providing legal opinion on validity of noon hour bible clubs.
M-27	M910075	Carleton Bd. of Ed.	July 13, 1992	Tom Wright	s.2(1),s.11(1)	none	Access granted to records showing standing of institutions's schools in provincial reviews, school-by-school and board-wide of all system-wide tests.
M-29	M-910070	Etobicoke Bd. of Ed.	July 30, 1992	Tom Wright	s. 10(1)	Outside Research Company	Access granted to staff report on poverty in Etobicoke. No infringement of <u>Copyright Act</u> .
M-47	M-910358	Espanola Bd. of Ed.	Oct. 7, 1992	Tom Mitchinson	s.6(1)(b) & 14	Board Employee	Access granted to severed record of in camera minutes of Committee of Whole meeting covering departure of former Board employee.
M-55	M-9200169	Dufferin-Peel R.C. Separate School Board	Oct. 30, 1992	Tom Mitchinson	s. 14(2)(d)(f)(g) (h) & (i) and s.14(3)	Students	Access granted to name of child who allegedly threw stone in playground for purpose of joining child as party to existing civil litigation, but no access granted to names of potential witnesses.

Source: Compiled by Brenda Stokes Verworm from the Orders made by the Office of the Information and Privacy Commissioner/Ontario (Toronto) in 1992.

APPENDIX K

**CHART 1: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1992**

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-65	M-910360	Halton Bd. of Ed.	Nov. 19, 1992	Holly Big Canoe	s. 10(1)(a)	Apple Canada Inc.	Access granted to school development proposal, to develop an advanced technical secondary school with Apple Canada (Letter of Intent & Proposal)
M-71	M-910422	Nipissing Board of Education	Dec. 10, 1992	Assistant Commissioner Tom Wright	s.22(2) s.6(1)(b) s.38(a)	Appellant's Wife	

CHART 2: PRIVACY INVESTIGATION REPORTS INVOLVING SCHOOL BOARDS IN 1992

Investigation	Date of Order	Inquiry Officer	Issue	Complaint	Decision/Recommendation
192-10M	March 27, 1992	Asst. Commissioner Cavoukian	Disclosure of Personal Information (ie. home address)	School Board wrote to an individual in her official capacity <u>but</u> at her home address.	IPC recommended School Board establish stricter procedures in order to comply with s.32 of the <u>Act</u> .
191-46M	April 1, 1992	Asst. Commissioner Cavoukian	Collection of Personal Information (ie. prescription/medical expense claims)	Board employee complained about School Board collecting personal information by requiring employees to submit prescription expense claims through their offices in order to be reimbursed through their medical insurance plan.	IPC recommended that medical expense claims be sent directly to the insurer, rather than Board. Also, Board to destroy all existing records regarding medical/dental/vision claims within 6 months, and to notify all employees that records had been destroyed.
192-17M	May 1, 1992	Asst. Commissioner Cavoukian	Disclosure of Personal Information (ie. S.I.N.)	School Board disclosed a person's social insurance number (SIN) without their consent by including it on a seniority list posted in the institution.	IPC concluded that the inclusion of the SIN was done in error, and that Board had taken steps to ensure error not repeated.
192-16M	July 1992	Asst. Commissioner Cavoukian	Disclosure of Personal Information (ie. student)	Student complained School Board faculty allegedly disclosed personal information to the complainants parents without her consent.	IPC concluded that since the info in question was not recorded it did not meet the definition of personal information under s.2(1) of the Act.
192-50M	Aug. 12, 1992	Asst. Commissioner Cavoukian	Personal Information available in databank (ie. School Tax Support)	Woman complained her husband, a non-Catholic, received a letter from Separate Board requesting him to direct his taxes from public to separate board and that this constituted a misuse of personal information.	IPC determined that info regarding your tax support is contained in a public record; s.27 did not apply to personal info that had been maintained for purpose of creating a record available to general public, information not used contrary to legislation.
192-60M	Aug. 28, 1992	Asst. Commissioner Cavoukian	Disclosure of Personal Information (ie. copies of correspondence.)	An individual complained that his personal info (his name plus nature of request) had been improperly disclosed by the School Board when it copied its reply to his request for access to records to five other individuals.	School Board acknowledged it should not have done this, agreed to take steps to ensure it didn't happen again.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-80	M-9200373	Halton Bd. of Ed.	Jan. 29, 1993	Inquiry Officer Asfaw Seife	None	None	IPC found the Board's record search reasonable regarding access to purchase orders for supplying hardware and software to Board Computer Training Centre.
M-91	M-9200003	Lincoln County Board of Education	March 2, 1993	Tom Mitchinson	s.10 s.11(h)	Nelson Canada	Request by parent of student tested for giftedness for copy of student's tests. IPC ordered Access be granted to severed copy of student's answer booklet of Stanford Binet Intelligence Scale 4th Ed. <b>NOTE:</b> Case under Judicial Review
M-96	M-910462	Wellington County Board of Education	March 9, 1993	Assistant Commissioner Tom Mitchinson	s.14	O.S.S.T.F.	President of OSSTF had requested from Board the phone numbers of permanent <u>or</u> regularly employed federation members, but Board denied on basis personal information and disclosure would constitute unjustified invasion of personal privacy. Federation argued s.14(2)(d) <u>but</u> IPC said not relevant; also argued s.32 but IPC said that section prohibits disclosure except in certain circumstances and does not create a right of access. IPC upheld the Board's decision <u>not</u> to disclose the phone numbers on the basis of the mandatory exemption in s.14(1).

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-99	M-9200349	The Cochrane, Iroquois Falls, Black River-Matheson District R.C. Separate School Board	March 10, 1993	Inquiry Officer Asfaw Seife	s. 2 s.14	Teacher's Aide	Board was asked by parents of Special Needs child for access to qualifications of named individual who had been hired for position of teacher's aide, who refused to give consent to disclosure. Qualifications are personal information due to definition including employment history and educational background, and under s.14(3)(d) disclosure would be an unjustifiable invasion of personal privacy. IPC upheld Board's decision not to disclose qualifications of teachers's aide.
M-100	M-9200154	The Carleton R.C. Separate School Board	March 10, 1993	Inquiry Officer Holly Big Canoe	s.38(a) s.13 s.2(1)	Children of Appellant	Request for access to all School Board records which document, explain or report incidents in which the person's spouse or 3 children (all under age 16) <u>or</u> self were involved. Board granted partial access to 108 page record <u>but</u> denied access to 4 pages. under s.38(s)(3) which formed basis of appeal. Appellant sought more records. Six further pages located and released during mediation. IPC considered whether the Board's search was 'reasonable'. continued...



**CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993**

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-100 cont'd.	M-9200154	The Carleton R.C. Separate School Board	March 10, 1993	Inquiry Officer Holly Big Canoe	s. 38(a) s.13 s.2(1)		The Board had to demonstrate the number of people involved (15) and the nature of the extent of the search, such as OSRs; teacher's day book, teacher anecdotes & teacher records; school office files; special education, student services; transportation files, etc. IPC ordered release of 4 pages of teacher's notes regarding comments made by children about their father because he was already aware of allegations & CAS involvement, and IPC felt disclosure of remarks would not threaten children's safety or health.
M-101	Appeal M-910422	The Nipissing Board of Education	March 10, 1993	Assistant Commissioner Tom Mitchinson	s.38(a) s.6(1)(b)		Decision relates to Interim Order M-71. IPC upheld Board's decision to withhold records from disclosure under s.38(a).

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-103	M-9200147	Norfolk Board of Education	March 11, 1993	Inquiry Officer Asfaw Seife	ss 14(3) s.45(1)		Board received a 10-part request for access to files regarding personal and financial matters of Board. Board provided a letter with a fee estimate for search time, photocopying and labour and notified them of the waiver provisions. IPC decided Board did <u>not</u> give sufficient detailed information <u>or</u> evidence to support the fee estimate, so not permitted to charge it. IPC also ordered Board to issue a final access decision within 15 days, and said that Board should have done so within original 30 days and not rendered an 'interim' decision based on the fee estimate. Interim decisions only appropriate if would be unduly expensive to produce.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-104	M-920218	Windsor Board of Education	March 24, 1993	Tom Mitchinson	s.54(c) s.14 2.2(1)	Mother Student	Natural father of student under age 16 requested access to 'registration maintenance screen' which was computer sheet of individuals and phone numbers Board was to contact in an emergency. Board denied access under s.14. Student and mother did <u>not</u> consent to disclosure. Father not entitled to it because under s.54(c) did not have 'lawful custody' under divorce. IPC upheld Board decision not to release name and phone numbers of student, her mother or the mother's new spouse because under s.14(1) it is an unjustified invasion of privacy.
M-106 M-107 M-108	M-9200140 M-9200146 M-9200069	Norfolk Board of Education	March 25, 1993 March 25, 1993 March 25, 1993	Tom Mitchinson Tom Mitchinson Tom Mitchinson	s.14(1) s.2(1)	Co-op students and Service providers and employees who are named in the accounts report.	Request for access to copy of 'accounts report' referred to at March 3/92 Board meeting, which consists of list of cheques issued by Board over 2-wk period to reimburse employees and service providers. Board gave access to summary of disbursements <u>but</u> not actual accounts reports claiming s.14(1). IPC ordered disclosure of accounts report with the individuals named on the basis that info provided by an individual in a potential capacity or in execution of employment responsibilities is not personal information. continued . . .

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-106 M-107 M-108 continued							Info about payments made to reimburse individuals (employees + service providers + co-op students) for expenses incurred in course of carrying out duties as public employees is <u>not</u> personal information and s.14(1) does <u>not</u> apply.
M-113	M-9200246	Halton Board of Education	March 31, 1993	Inquiry Officer Holly Big Canoe	s.2(1)	Trustee	Elected School Trustee who presented rationale plus three motions on Key Communicator Program to Board on Jan. 15/92 appealed Board's decision to release the report to a requester because it contains opinions and views that are personal information and release would constitute an unjustified invasion of privacy. IPC said views and opinions expressed by publicly elected official about Board program is <u>not</u> personal information. Only the Trustee's home address can be severed. Access to record granted.
M-114 M-115	M-9200247 M-9200162	Halton Board of Education	March 31, 1993	Holly Big Canoe	s.21 s.14(1) s.2(1)	Trustee	IPC ordered access to various documentation concerning "Key Communicators" Program that had been distributed to Trustees.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-122	M-9200350	The Northern District School Area Board	Apr. 22, 1993	Holly Big Canoe	ss.2(1) 14(2)(3) s.38	Authors of Letters (Parents)	<u>Held</u> : A teacher sought and obtained 2 letters written by parents to the Principal & S.O. complaining about the teacher's conduct. Teacher complained the records were used against him without knowing the contents or accusers resulting in Board relocating him to another school 650 km away. Board denied request on basis it contained personal info about others, and after a reasonable search denied the existence of any report. IPC held that an individual's right of access to their personal info is <u>not</u> an absolute right if the release of the info would constitute an unjustified invasion of other individual's personal privacy, <u>but</u> in this case it did not meet any of the exemptions in s.14. Therefore, the release of the letters was ordered, with only the address and telephone numbers of the authors deleted. It was not sufficient teacher had alternative rights to disclosure in a grievance proceeding.
M-126	M-9200243	Halton Board of Education	April 26, 1993	Holly Big Canoe	N/A	N/A	<u>Held</u> : Request by Trustee of Board to all info dealing with opinions expressed by the Trustee conducted during the Board Meetings between Apr. 1/92 & June 7/92. In response to request Board provided Trustee with a binder of records distributed at Committee of the Whole.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-122 continued							Trustee appealed on basis didn't think Board had conducted reasonable search of records. IPC reviewed the affidavits of Board personnel and was satisfied the searches for other records were reasonable in the circumstances.
M-134	M-9300040	Hamilton Board of Education	May 28, 1993	Holly Big Canoe			Appeal by person claiming Board had records of a meeting held between the Principal, the requester and another student was <u>denied</u> on basis Board convinced FOI through affidavit evidence from FOI coordinator and Principal that no such notes were in existence, and that a reasonable manual search of the files and consultations with informed Board staff revealed no records.
M-136	M-9200450	The Lanark Leeds & Grenville County Roman Catholic Separate School Board	May 31, 1993	Anita Fineberg			Father sought access to information regarding his daughter from child's former school and claimed additional records existed concerning her OSR; notes of meetings with school officials; psycho-educ. assessment report, etc. At inquiry stage Board conducted search and produced a few more records <u>but</u> denied existence of others. FOI satisfied that Board had taken all reasonable steps to locate any records and provided supporting affidavit evidence, and, therefore, <u>denied</u> appeal.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-137	M-9200473	Halton Board of Education	June 2, 1993	Irwin Glasberg			Request for access to records concerning date of recruitment of four named individuals as "Key Communicators". Board denied existence of any such records. Issue was whether search for records was reasonable. FOI was satisfied the Board had conducted a reasonable search of all its records and outlined in its affidavits its record-keeping practice, steps taken to locate and inquiries made to staff and <u>denied</u> appeal.
M-140	M-9300062	Halton Board of Education	June 9, 1993	Holly Big Canoe			Request for access to any records concerning discussions held between former Chair of Board and newspaper personnel, their names and dates of meetings, etc. Board denied access on grounds that records did not exist. Duty of Board to clarify request, and duty of FOI to ensure Board made reasonable efforts to identify and locate any records. The Act does not require an institution to prove to the degree of absolute certainty that the requested records do not exist. FOI satisfied that Board's search was reasonable and that Chair's affidavit outlined that contact with newspaper editor was by two telephone conversations on Nov. 9/91, and that no records of discussion were made of either.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-143	M-9200154	York Region Board of Education	June 11, 1993	Holly Big Canoe	s. 14	Student	Request for access to all reports or written communication concerning attack on secondary school student. Board denied access based on it being personal information and mandatorily exempted under s.14. In upholding Board's decision and <u>denying</u> access, the FOI considered the fact the individuals were <u>not</u> employees of the Board; the incident was well-known in the community and even severing names and addresses would still result in individuals being identifiable. The FOI was not persuaded that disclosure would permit public scrutiny of Board activities or promote public health and safety, since there was no evidence that the Board's activities had been publicly called into question.
M-145	M-9200405	Halton Board of Education	June 11, 1993	Holly Big Canoe	s. 21 s. 10 (1)	Computer Suppliers	Request for access to records describing the agreements and relationships between the Board and the suppliers of computer hardware & software for use in a new secondary school. The third party suppliers objected to disclosure based on s.10 of the Act, which requires satisfying a 3-part test. The FOI accepted that the record info relating to sale and purchase prices for computer equipment is " <u>commercial info</u> ", which by affidavits from the Board & suppliers have been attested to as " <u>supplied in confidence</u> " ... continued



CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-145 continued							(although not marked that way) and that disclosure would <u>significantly prejudice their competitive position</u> (pricing and marketing) in the municipal and educational market and <u>result in financial loss</u> if disclosure made to a competitor. Since 3-part test met, FOI upheld Board's decision to <u>deny</u> access.
M-148	M-9200343	Toronto Board of Education	June 21, 1993	Asfaw Seife			Terminated Board employee made a request for copies of an audit's findings and recommendations prepared by Peat, Marwick & Thorne on the Toronto School Board's operations. Board claimed no such records existed, and if they did the records were <u>not</u> within the Board's custody. Issue was whether or not the Board conducted a reason-able search to identify and locate the requested records. The Board's affidavit contained letters from 2 law firms attesting to nothing in their files, and 1 letter from Board Comptroller denying that any audit was requested or carried out by the firm, but the Board <u>failed</u> to satisfy the FOI that the search was reasonable since they failed to consult the accounting firm and did not physically search the files where such records would be kept if in existence. The FOI ordered the Board conduct a further search including contact with . . . . continued

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-148 continued							an experienced Board employee familiar with the records; an official from the forensic division of the accounting firm; and the Board's solicitors.
M-152	M-9200372	Halton Board of Education	June 25, 1993	Anita Fineberg	s. 4(1)	Board's Auditors and Institute of Chartered Accountants of Ontario	Request for access to Board's external auditor's working papers on certain courses offered by the Board. The Board denied the existence of the records, and on appeal, agreed that the issue was whether the papers are records in the custody <u>or</u> under the control of the Board. In determining the definition of "custody" & "control" a broad and liberal meaning was to be given and reference was made to several factors including the right to possession, right to regulate use of record; reliance on record, authority to dispose of record etc. The ICAO contended that "generally accepted auditing standards" consider audit "working papers" the property of the auditor, not the client, & such papers upon which the audited opinion is based have always remained in the physical possession of the auditor. The FOI upheld the Board's decision <u>not to disclose</u> , because they are not records in their custody or control.

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-154	M-9200184	Halton Board of Education	June 28, 1993	Commissioner Tom Wright		Other persons mentioned in the records.	Request was made for access to all records containing personal information about the requester which were in custody and control of Board. The Board contacted several persons who were mentioned in the records to make representations on disclosure. One of these persons, an elected School Board Trustee, then appealed the Board's decision to release the requested records on the basis it contained personal information. The report at issue is entitled "A Report on the Key Communicator Program" and is identical to a record dealt with in Order M-114, which referred to the Trustee's opinions and views on the Board program as <u>not</u> being "personal" because they were expressed in capacity as publicly elected official. Therefore, the FOI <u>upheld the Board's decision to disclose the records</u> .

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-156	M-9200395	Simcoe County Board of Education	June 30, 1993	Holly Big Canoe	s. 39 (2)		<p>Parent requested access to all records in Board's control and custody concerning his son. Board granted access to contents of OSR <u>but</u> denied access to inventory list of items not contained in OSR, and later claimed could not locate them. Parent appealed decision not to release records re: special needs assessment; committee meetings; program plan; etc. Time period for appeal not infringed because parent's request for access to inventory list of items was a <u>separate</u> request from that of OSR. Board satisfied FOI that <u>reasonable search of files was conducted</u>. However, Board also made reference to 4 items that were now destroyed because no longer current, accurate or conducive to improving child's instruction. FOI concerned that Board did not provide evidence of Board retention policy. Notwithstanding, FOI concluded Board did reasonable search of records.</p>

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-163	M-9300100	Halton Board of Education	June 16, 1993	Anita Fineberg	s. 45 (1) (6)		<p>Access request made to examine and receive copies of the attendance records at the A.C.T. (Adult Computer Training Centre) for 2-yr. period. Board said access would be granted subject to s.14 removal of personal info., <u>but</u> at a cost of \$465.40 (later revised to \$251) for computer and manual search time, and preparation and photocopying costs. Requester <del>appealed</del> <u>appealed fee estimate</u> as excessive. Issue is whether estimated fees were calculated in accordance with s.45(1), for which the onus is on the Board. In reviewing appropriateness of the estimate, the FOI indicated insufficient evidence to support search time of some records, and cannot charge photocopying fee per page <u>plus</u> hourly rate for feeding machine (photocopying fee <u>includes</u> it). The FOI revised the fee estimate to be \$166.70.</p>

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-166	M-9200357	Halton Board of Education	July 23, 1993	Asfaw Seife	s. 207 (4) <u>Education Act</u>  s. 45 F.O.I.		Request to examine the detailed <u>expense accounts</u> of 5-named individuals over a 5-year period. (receipts, invoices, phone bills & other supporting documentation). Board denied access under s.14 - which was subject of earlier Appeal M-910315. Board determined that it involved extensive records and would cost <u>\$12,047</u> (later \$10,677.60) to assimilate and 2 months staff time. Requester appealed fee estimate, and Board's refusal to waive the fee. Requester relies on s.207(4) of the <u>Education Act</u> to claim she can <u>examine</u> the records free of charge, namely "the current accounts" of a board. The FOI ruled that "current accounts" ( <u>not</u> defined in the <u>Act</u> , <u>but</u> ordinary dictionary definition did <u>not</u> include the requested material and referred instead to statement of Board's debits & credits. Therefore, s.207(4) does not apply. Board acknowledges the fee would create a financial hardship <u>but</u> denied waiver on basis waiver not "fair or equitable" to public taxpayers. The correctness of this decision was reviewable by the FOI, which <u>upheld the Board's decision not to waive the fee.</u>

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-171	M-9200319	Halton Board of Education	August 6, 1993	Anita Fineberg	s. 14 s. 45 (1) & (6)		<p>Request made for access to all records detailing expenditures for the years 1987-1991 charged against the Director of Education Discretionary Expense Account. Board responded with interim decision granting partial access minus personal info of individuals named in account and a fee estimate of \$685 to <u>examine</u> the records (but not get copies). Appeal of the estimate and its calculation made to IPC on basis s.207(4) of the <u>Education Act</u> permits free inspection of "current accounts" and copies at a cost of 25¢ per 100 words. The parties both cited different dictionary definitions for the term "current accounts" The Board relied upon the wording in s.234(4) of the <u>Education Act</u> which requires a Board to produce vouchers and documents relating to expenses to their auditors, but in s.207(4) these terms are not used. In support of its position the Board's Manager of Accounting submitted an affidavit stating that the monthly account reports for the current fiscal year constitute the current accounts.</p> <p>... continued</p>

CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-171 continued	M-9200319	Halton Board of Education	August 6, 1993	Anita Fineberg	s. 14 s. 45 (1) & (6)		IPC held that, just like Order M-166, "current accounts" refers only to statements in writing of debits and credits for current fiscal year, and do not include background documents which may have in some way contributed to the numbers which appear on the statements, such as vouchers or invoices. Since the <u>Education Act</u> does not provide a charge or fee for the requested documents, then s.45 of MFIPPA does apply and Reg. 823. After considering the Board's submissions supporting how it calculated its fee estimate, the IPC upheld the estimate of \$670 (but not the \$15 cost for driving to an off-site location to get the files.)
M206	M-9100443	Welland County Roman Catholic School Board	October 26, 1993	Inquiry Officer Anita Fineberg	sections 2 (1) (2) 6 (1) (b) 12, 14, 38 (b), 54 (a)	- Victim/ Complainant  - Crown Attorney's Office/Police	Personal rep acting on behalf of executrix of husband's estate requested records held by Board pertaining to deceased who was former employee. Employment records were released on basis related to admin of estate, <u>but</u> other records requested about alleged criminal conduct were denied on the basis were unjustified invasion of victim/complainant's privacy and not relevant to administration of estate. Board's decision upheld by FOI Commissioner.



CHART 3: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1993

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-213	M-9300109	Board of Education for the Borough of East York	Nov. 10, 1993	Asst. Commissioner Irwin Glasberg	s. 12	Solicitors acting for Board	On appeal the FOI ordered the release of the legal account on the basis that it did not constitute legal advice, opinion, recommendations or strategy, and did not meet the test of being protected by solicitor-client privilege.
M-221	M-9300159	Kirkland Lake - Timiskaming Roman Catholic School Board	Nov. 19, 1993	Inquiry Officer Asfaw Seife	sections 11 (c) & (d) 9 (1) (b) 10 (1) (a) & (c)	Ministry of Education	<u>Held:</u> The Commission ordered the disclosure of a letter from the Ministry of Education to the Board citing the provincial contribution toward the transition costs arising from the amalgamation of the two school boards.
M-231	M-9300292	Timiskaming Board of Education	Dec. 3, 1993	Inquiry Officer Holly Big Canoe	s. 21 s. 10 (1) (a)	Service Master of Canada Ltd.	<u>Held:</u> The Commission ordered Service Master to release a copy of its contract with the Board to the requestor because it did not contain personal information about any identifiable employees; and also it was a negotiated agreement (as stipulated in the contract) and was <u>not</u> information "supplied" to the Board.

CHART 4: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1994

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-255	M-9300108	Metropolitan (Toronto) Separate School Board	Feb.1, 1994	Inquiry Officer Laurel Cropley	None	None	<u>Held:</u> The Commission found the Board had conducted a reasonable search for records about external meetings and their corresponding expense accounts. The existence of these documents is a separate issue from that of the accuracy of the documents.
M-256	M-9300058	Hornepayne Board of Education	Feb. 1, 1994	Inquiry Officer Donald Hale	s. 38 (b) s. 2 (1) s. 14	Authors of letters  Individuals named in letters	<u>Held:</u> The Commission ordered the release of two letters written by 3rd parties about the appellant even though they were sent to the Chair of the Board and the authors had requested the letters be kept confidential and only reviewed if and when any further students asked. Although the letters contained personal information, there was no evidence that disclosure of this information would contribute an unjustified invasion of another individual's privacy.

CHART 4: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1994

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-256 continued	Appeal M-9300058	Hornepayne Board of Education	Feb. 1, 1994	Inquiry Officer Donald Hale	s. 2(1) s. 14 2. 38(b)	Authors of two letters	Held: The IPC ordered the release of the two letters because the requesters right of access outweighed the other individuals' right of privacy. The onus and proof that disclosure of the personal info would constitute and unjustified invasion of privacy rests on the author & institution not the requester.
M-258	M-9200278	Toronto Board of Education	Feb. 4, 1994	Inquiry Officer Anita Fineberg	s. 2(1), s.8, s.10, s. 12, s. 14	Accounting firm that prepared the records.	Held: The FOI granted access to 19 records (37 pages) of invoices submitted to the Board's solicitor but prepared by an accounting firm regarding forensic and investigative accounting services. The Board had hired the accounting firm to help in 3 matters: suspected fraud in the Continuing Ed Dept.; altered student transcripts; potential wrongdoing by the Board's maintenance dept. The inquiry examined whether any of the requested info constituted "personal information" and whether or not a mandatory or discretionary exemption applied to preclude its release. Info provided by an individual in a professional capacity or in the execution of employment responsibilities is <u>not</u> "personal info".

CHART 4: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1994

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-258 continued							The Board cannot rely on s.8 because internal institution investigations conducted as an employer do not constitute "law enforcement" as defined by the Act even while grievance hearings may result because the investigation <u>must</u> be conducted by the police. The mere involvement or interest of the police in the alleged offenses does <u>not</u> transform the Board's internal investigation into a law enforcement investigation. Also, there was <u>no</u> evidence provided by the Board that the investigation (police) was <u>ongoing</u> , or that any alleged harm would result from its disclosure, or that the release would result in depriving the subjects of the investigation of any rights. The inquiry officer rejected the Board's argument that s.12 applied on the basis the auditor's invoices were <u>not</u> communicators between the Board and a "legal adviser" (ie. solicitor) and are <u>not</u> directly related to the seeking, formulating, or giving of legal advice and were not part of any pending litigation package. The dominant purpose for creating the invoices was to ensure authorization by the Board for payment, not for giving

CHART 4: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1994

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-258 continued							legal advice or for use in litigation. Although the invoices constitute commercial and financial info concerning the buying and selling of investigative services, the Inquiry Officer rejected the argument of s.10 exemption. The Board did not establish that the disclosure of fees for services rendered would <u>significantly prejudice</u> the competitive position of the accounting firm.
M-259	Appeal M-9300416	Metropolitan Separate School Board (Toronto)	Feb. 4, 1994	Inquiry Officer Laurel Cropley	s. 19 s.22 (1) (a)	Ministry of Education	Held: The Board's response letter was appropriate because it provided the basis/reasoning for referring to "Ministry confirmation" in earlier correspondence.
M-262	M-9300371 M-9300379 M-9300380 M-9300382 M-9300383 M-9300384 M-9300385	Metropolitan Separate School Board (Toronto)	Feb. 7, 1994	Inquiry Officer Holly Big Canoe	s.2(1) s.11 (c) & (d) s.14 s.20 s.22(4)		Held: The FOI granted access to copies of computer generated expense account sheets, including attachments and receipts and credit card statements (except for the actual credit card numbers) for 7 named Board employees concerning the use of the credit card to pay for auto-related expenses for business or personal use. Since the records are expensive to produce, the

CHART 4: ACCESS TO INFORMATION ORDERS INVOLVING SCHOOL BOARDS IN 1994

FOI ORDER	APPEAL NO.	BOARD OF EDUCATION	DATE OF ORDER	INQUIRY OFFICER	SECTIONS	THIRD PARTY	DECISION
M-262 continued							<p>rulings on a "sample" of records prepared by the Board, will apply to all the other requested records. The Inquiry Officer did <u>not</u> consider s.11 because the Board failed to raise it in its decision letter to the appellant. Since the records concern expenses or credit card charges incurred by employees during the course of their employment as public employees does <u>not</u> qualify as personal information. There is no evidence that the records contained info relating to "personal" expenses. Since the records are not personal info, s.14 was not considered.</p>

## MEMBER BOARDS

### NORTHERN REGION

Airy & Sabine District School Area Board  
 Asquith-Garvey District School Area Board  
 Atikokan Board of Education  
 Caramat District School Area Board  
 Central Algoma Board of Education  
 Chapleau Board of Education  
 Cochrane-Iroquois Falls, Black River-Matheson  
 Board of Education  
 Connell and Ponsford District School Area Board  
 Dryden Board of Education  
 East Parry Sound Board of Education  
 Espanola Board of Education  
 Foleyet District School Area Board  
 Fort Frances-Rainy River Board of Education  
 Geraldton Board of Education  
 Hearst Board of Education  
 Hornepayne Board of Education  
 James Bay Lowlands Secondary School Board  
 Kapuskasing Board of Education  
 Kenora Board of Education  
 Kilkenny District School Area Board  
 Kirkland Lake Board of Education  
 Lake Superior Board of Education  
 Lakehead Board of Education  
 Manitoulin Board of Education  
 Michipicoten Board of Education  
 Mine Centre District School Area Board  
 Moose Factory Island District School Area Board  
 Moosonee District School Area Board  
 Muskoka Board of Education  
 Nakina District School Area Board  
 Nipigon-Red Rock Board of Education  
 Nipissing Board of Education  
 North Shore Board of Education  
 Northern District School Area Board  
 Red Lake Board of Education  
 Sault Ste. Marie Board of Education  
 Sudbury Board of Education  
 Timiskaming Board of Education  
 Timmins Board of Education  
 Umfreville District School Area Board  
 Upsala District School Area Board  
 West Parry Sound Board of Education

### EASTERN

Carleton Board of Education  
 Le Conseil scolaire de langue française  
 d'Ottawa-Carleton (publique)  
 Frontenac County Board of Education  
 Hastings County Board of Education  
 Lanark County Board of Education  
 Leeds & Grenville County Board of Education  
 Lennox & Addington County Board of Education  
 Prescott & Russell County Board of Education  
 Prince Edward County Board of Education  
 Renfrew County Board of Education  
 Stormont, Dundas & Glengarry County Board of Education

### CENTRAL EAST

Durham Board of Education  
 East York Board of Education  
 Haliburton County Board of Education  
 Metro Toronto School Board  
 North York Board of Education  
 Northumberland & Newcastle Board of Education  
 Ottawa Board of Education  
 Peterborough County Board of Education  
 Scarborough Board of Education  
 Victoria County Board of Education

### SOUTHERN

Brant County Board of Education  
 Haldimand Board of Education  
 Lincoln County Board of Education  
 Niagara South Board of Education  
 Norfolk Board of Education  
 Waterloo County Board of Education  
 Wellington County Board of Education  
 Wentworth County Board of Education

### CENTRAL WEST

City of York Board of Education  
 Le Conseil des écoles françaises de la communauté  
 urbaine de Toronto  
 Dufferin County Board of Education  
 Etobicoke Board of Education  
 Halton Board of Education  
 Peel Board of Education  
 Simcoe County Board of Education  
 Toronto Board of Education  
 York Region Board of Education

### WESTERN

Bruce County Board of Education  
 Elgin County Board of Education  
 Essex County Board of Education  
 Grey County Board of Education  
 Huron County Board of Education  
 Kent County Board of Education  
 Lambton County Board of Education  
 London Board of Education  
 Middlesex County Board of Education  
 Oxford County Board of Education  
 Perth County Board of Education  
 Windsor Board of Education

Source:

### ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

439 University Avenue, Toronto, ON M5G 1Y8  
 Tel: (416) 340-2540/Fax: (416) 340-7571

## SUMMARY OF RECOMMENDATIONS

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1. OPSBA recommends that the Standing Committee on the Legislative Assembly and the Information and Privacy Commissioner consult with municipal users to determine how the appeal process can be made simpler, more expeditious, and less costly.
2. OPSBA recommends that consideration be given to reducing or removing the onerous and complex burden imposed by subs. 4(2) of the *Act*.
3. OPSBA recommends that the *Act* be amended to state that where a group of documents all contains identical or similar kinds of information, the group may be treated as a single record for purposes of the institution's decision.
4. OPSBA recommends that subsection 41(6) remain intact.
5. OPSBA recommends that subsection 45(2) of the *Act* be deleted. This amendment would give two hours free search time to requesters seeking their own personal information; thereafter the fees applicable to general records would apply.
6. OPSBA recommends that subsection 45(1) of the *Act* be amended to allow institutions to charge for "the time spent reviewing a record, making a decision, and preparing a decision letter."
7. OPSBA recommends that the *Act* be amended to make a requester bear the onus of showing that a fee is unreasonable.
8. OPSBA recommends that appeals involving fees of less than \$1000 be resolved in a summary fashion by telephone conference.
9. OPSBA recommends that the full costs be paid by the requester for information to be used for commercial purposes.

**Source:**

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Ontario Public School Boards' Association

Submission to the Standing Committee on the Legislative Assembly,  
presented by Helena Nielsen OPSBA Vice-President, January 20, 1994, pp.16-18.



10. OPSBA recommends that the *Act* be amended to allow an institution to treat as a single request multiple requests from the same individual, whether or not they are received on the same day.
11. OPSBA recommends that section 15 of the *Act* be amended to exempt from disclosure a record that,
  - (a) the requester already possesses,
  - (b) contains information the requester already possesses,
  - (c) has already been the subject of an access request by the same requester, or
  - (d) contains the same information as another record that has already been the subject of an access request by the same requester.
12. OPSBA recommends that the *Act* be amended to allow the head of an institution to decide to disregard a request to access to records if the request is vexatious, frivolous or amounts to an abuse of the right of access. Further, that this amendment be accompanied by a provision to allow the requester to appeal such a decision by the head of an institution.
13. OPSBA asks the Standing Committee on the Legislative Assembly to consider whether it is necessary to regulate all of the activities currently caught by the privacy rules in Part II of the *Act* and, if so, whether the same rules should apply to different types of activities.
14. OPSBA recommends that Part II of the *Act* be amended so that it does not apply to an institution when it acts in the capacity of employer.

Should regulation in this area be desired, OPSBA further recommends that workplace information use/collection/retention/disclosure be addressed through amendments to employment-related statutes that already exist.

15. OPSBA recommends that Part II of the *Act* be amended so that it does not apply to school boards, and that any rules necessary to protect student privacy be incorporated into the *Education Act*.
16. OPSBA recommends that the Committee inquire into the expenditure of public funds on investigations which the Commissioner has no statutory authority to conduct.
17. OPSBA recommends that the *Act* not be amended to give the Commissioner power to order an institution to cease a use, disclosure or retention practice.
18. OPSBA recommends that the *Act* not be amended to insulate the Commissioner from review of legal or factual errors in his decisions; in particular, it recommends that the *Act* not be amended to include a privative clause.

## Bill 49

(Chapter 63  
Statutes of Ontario, 1989)An Act to provide for  
Freedom of Information and  
Protection of Individual  
Privacy in Municipalities  
and Local BoardsThe Hon. M. Elston  
Chairman of the Management  
Board of Cabinet

1st Reading	July 20th, 1989
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## Projet de loi 49

(Chapitre 63  
Lois de l'Ontario de 1989)Loi prévoyant l'accès à  
l'information et la protection  
de la vie privée dans les  
municipalités et les conseils  
locauxL'honorable M. Elston  
Président du Conseil de  
gestion du gouvernement

1 <sup>re</sup> lecture	20 juillet 1989
2 <sup>e</sup> lecture	10 octobre 1989
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## Bill 49

1989

An Act to provide for Freedom of Information and  
Protection of Individual Privacy in  
Municipalities and Local Boards

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

## Purposes

## 1. The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and
  - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

## Definitions

## 2.—(1) In this Act,

“head”, in respect of an institution, means the individual or body determined to be head under section 3; (“personne responsable”)

“Information and Privacy Commissioner” and “Commissioner” mean the Commissioner appointed under subsection 4 (1) of the *Freedom of Information and Protection of Privacy Act, 1987*; (“commissaire à l’information et à la protection de la vie privée”, “commissaire”)

“institution” means,

- (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,
- (b) a school board, public utilities commission, hydro-electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act*,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations; (“institution”)

R.S.O. 1980,  
c. 302

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b); (“exécution de la loi”)

“Minister” means the Chairman of the Management Board of Cabinet; (“ministre”)

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual; ("banque de renseignements personnels")

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act. ("règlements")

Personal  
information

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

Bodies  
considered  
part of  
municipal  
corporation

(3) Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipal corporation for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation.

Designation  
of head

3.—(1) The members of the council of a municipal corporation may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipal corporation for the purposes of this Act.

Idem

(2) The members elected or appointed to the board, commission or other body that is an institution other than a municipal corporation may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this Act.

If no  
designation

(3) If no person is designated as head under this section, the head shall be,

- (a) the council, in the case of a municipal corporation; and

- (b) the members elected or appointed to the board, commission or other body in the case of an institution other than a municipal corporation.

## PART I

## FREEDOM OF INFORMATION

## ACCESS TO RECORDS

Right of access

4.—(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

Severability of record

(2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Obligation to disclose

5.—(1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Notice

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so.

Contents of notice

(3) The notice shall contain,

- (a) a statement that the head intends to release a record or a part of a record that may affect the interests of the person;
- (b) a description of the contents of the record or part that relate to the person; and
- (c) a statement that if the person makes representations forthwith to the head as to why the record or part should not be disclosed, those representations will be considered by the head.

Representations

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed.

## EXEMPTIONS

Draft by-laws, etc.

6.—(1) A head may refuse to disclose a record,

- (a) that contains a draft of a by-law or a draft of a private bill; or
- (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

- (a) in the case of a record under clause (1) (a), the draft has been considered in a meeting open to the public;
- (b) in the case of a record under clause (1) (b), the subject-matter of the deliberations has been considered in a meeting open to the public; or
- (c) the record is more than twenty years old.

Advice or recommendations

7.—(1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator;

- (d) an environmental impact statement or similar record;
- (e) a report or study on the performance or efficiency of an institution;
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
- (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if the record is more than twenty years old.

Law  
enforcement

8.—(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;

- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Idem

(2) A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

- (b) that is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;
- (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
- (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

**9.—(1)** A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a province or territory in Canada;
- (c) the government of a foreign country or state;
- (d) an agency of a government referred to in clause (a), (b) or (c); or

- (e) an international organization of states or a body of such an organization.

Idem

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

Third party information

**10.—(1)** A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Consent to disclosure

(2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

Economic and other interests

**11.** A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (b) information obtained through research by an employee of an institution if the disclosure could

Refusal to confirm or deny existence of record  
Exception

Idem

Relations with governments



reasonably be expected to deprive the employee of priority of publication;

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;
- (h) questions that are to be used in an examination or test for an educational purpose;
- (i) submissions under the *Municipal Boundary Negotiations Act, 1981* by a party municipality or other body before the matter to which the submissions relate is resolved under that Act.

1981, c. 70

Solicitor-client privilege

**12.** A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Danger to safety or health

**13.** A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

Personal privacy

**14.—(1)** A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
- (e) for a research purpose if,
  - (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
  - (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
  - (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Criteria re invasion of privacy

**(2)** A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Presumed  
invasion of  
privacy

- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
- (b) discloses financial or other details of a contract for personal services between an individual and an institution.

Refusal to  
confirm or  
deny  
existence of  
record

Information  
soon to be  
published

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

15. A head may refuse to disclose a record if,

- (a) the record or the information contained in the record has been published or is currently available to the public; or
- (b) the head believes on reasonable grounds that the record or the information contained in the record

will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

Exemptions  
not to apply

**16.** An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

#### ACCESS PROCEDURE

Request

**17.—**(1) A person seeking access to a record shall make a request for access in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

Sufficiency of  
detail

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Definition  
1987, c. 25

**18.—**(1) In this section, "institution" includes an institution as defined in section 2 of the *Freedom of Information and Protection of Privacy Act, 1987*. ("institution")

Request to  
be forwarded

(2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

Transfer of  
request

(3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Greater  
interest

(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

When  
transferred  
request  
deemed  
made

(5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

Notice by  
head

**19.** Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20 and 21, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Extension of  
time

**20.—**(1) A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Notice of extension

(2) A head who extends the time limit under subsection (1) shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension;
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

Notice to affected person

**21.**—(1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 10 (1) that affects the interest of a person other than the person requesting information; or
- (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14 (1) (f).

Contents of notice

(2) The notice shall contain,

- (a) a statement that the head intends to disclose a record or part of a record that may affect the interests of the person;
- (b) a description of the contents of the record or part that relate to the person; and
- (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, if there has been an extension of a time limit under subsection 20 (1), within that extended time limit.

Notice of delay

(4) A head who gives notice to a person under subsection (1) shall also give the person who made the request written notice of delay, setting out,

- (a) that the disclosure of the record or part may affect the interests of another party;
- (b) that the other party is being given an opportunity to make representations concerning disclosure; and
- (c) that the head will within thirty days decide whether or not to disclose the record.

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

Decision re disclosure

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within thirty days after the notice under subsection (1) is given, but not before the earlier of,

- (a) the day the response to the notice from the person to whom the information relates is received; or
- (b) twenty-one days after the notice is given.

Notice of head's decision to disclose

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

- (a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

- (b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within thirty days after the notice is given.

Access to be  
given unless  
affected  
person  
appeals

(9) A head who decides under subsection (7) to disclose the record or part shall give the person who made the request access to the record or part within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

Contents of  
notice of  
refusal

**22.—**(1) Notice of refusal to give access to a record or part under section 19 shall set out,

- (a) where there is no such record,
  - (i) that there is no such record, and
  - (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
- (b) where there is such a record,
  - (i) the specific provision of this Act under which access is refused,
  - (ii) the reason the provision applies to the record,
  - (iii) the name and position of the person responsible for making the decision, and
  - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Idem

(2) A head who refuses to confirm or deny the existence of a record as provided in subsection 8 (3) (law enforcement) or subsection 14 (5) (unjustified invasion of personal privacy) shall state in the notice given under section 19,

- (a) that the head refuses to confirm or deny the existence of the record;
- (b) the provision of this Act on which the refusal is based;

- (c) the name and office of the person responsible for making the decision; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Idem

(3) A head who refuses to disclose a record or part under subsection 21 (7) shall state in the notice given under subsection 21 (7),

- (a) the specific provision of this Act under which access is refused;
- (b) the reason the provision named in clause (a) applies to the record;
- (c) the name and office of the person responsible for making the decision to refuse access; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

Deemed  
refusal

(4) A head who fails to give the notice required under section 19 or subsection 21 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Copy of  
record

**23.—**(1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

Access to  
original  
record

(2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

Copy of part

(3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

## INFORMATION TO BE PUBLISHED OR AVAILABLE

Publication  
of  
information  
re institutions

**24.—**(1) The Minister shall cause to be published a compilation listing all institutions and, in respect of each institution, setting out,

- (a) where a request for a record should be made; and
- (b) the title of the head of the institution.

Idem

(2) The Minister shall cause the compilation to be published within one year of the coming into force of this Act and at least once every three years thereafter.

Information  
available for  
inspection

**25.—**(1) A head shall cause to be made available for inspection and copying by the public information containing,

- (a) a description of the organization and responsibilities of the institution;
- (b) a list of the general classes or types of records in the custody or control of the institution;
- (c) the title, business telephone and business address of the head; and
- (d) the address to which a request under this Act should be made.

Idem

(2) The head shall ensure that the information made available is amended as required to ensure its accuracy.

Annual  
report of  
head

**26.—**(1) A head shall make an annual report, in accordance with subsection (2), to the Commissioner.

Contents of  
report

(2) A report made under subsection (1) shall specify,

- (a) the number of requests under this Act for access to records made to the institution;
- (b) the number of refusals by the head to disclose a record, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;

- (c) the number of uses or purposes for which personal information is disclosed if the use or purpose is not included in the statements of uses and purposes set forth under clauses 34 (1) (d) and (e);
- (d) the amount of fees collected by the institution under section 45; and
- (e) any other information indicating an effort by the institution to put into practice the purposes of this Act.

## PART II

## PROTECTION OF INDIVIDUAL PRIVACY

## COLLECTION AND RETENTION OF PERSONAL INFORMATION

Application  
of Part

**27.** This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

Definition

**28.—**(1) In this section and in section 29, "personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act. ("renseignements personnels")

Collection of  
personal  
information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

Manner of  
collection

**29.—**(1) An institution shall collect personal information only directly from the individual to whom the information relates unless,

- (a) the individual authorizes another manner of collection;
- (b) the personal information may be disclosed to the institution concerned under section 32 or under section 42 of the *Freedom of Information and Protection of Privacy Act*, 1987;
- (c) the Commissioner has authorized the manner of collection under clause 46 (c);

1987, c. 25

R.S.O. 1980,  
c. 89

- (d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*;
- (e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
- (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;
- (g) the information is collected for the purpose of law enforcement; or
- (h) another manner of collection is authorized by or under a statute.

Notice to  
individual

(2) If personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

- (a) the legal authority for the collection;
- (b) the principal purpose or purposes for which the personal information is intended to be used; and
- (c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

Exception

- (3) Subsection (2) does not apply if,
  - (a) the head may refuse to disclose the personal information under subsection 8 (1) or (2) (law enforcement);
  - (b) the Minister waives the notice; or
  - (c) the regulations provide that the notice is not required.

Retention of  
personal  
information

**30.**—(1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.

Standard of  
accuracy

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

Exception

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes.

Disposal of  
personal  
information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations.

## USE AND DISCLOSURE OF PERSONAL INFORMATION

Use of  
personal  
information

**31.** An institution shall not use personal information in its custody or under its control except,

- (a) if the person to whom the information relates has identified that information in particular and consented to its use;
- (b) for the purpose for which it was obtained or compiled or for a consistent purpose; or
- (c) for a purpose for which the information may be disclosed to the institution under section 32 or under section 42 of the *Freedom of Information and Protection of Privacy Act, 1987*.

1987, c. 25

Where  
disclosure  
permitted

**32.** An institution shall not disclose personal information in its custody or under its control except,

- (a) in accordance with Part I;
- (b) if the person to whom the information relates has identified that information in particular and consented to its disclosure;
- (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
- (d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is

necessary and proper in the discharge of the institution's functions;

- (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;
- (f) if disclosure is by a law enforcement institution,
  - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or
  - (ii) to another law enforcement agency in Canada;
- (g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification is mailed to the last known address of the individual to whom the information relates;
- (i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;
- (j) to the Minister;
- (k) to the Information and Privacy Commissioner;
- (l) to the Government of Canada or the Government of Ontario in order to facilitate the auditing of shared cost programs.

Consistent  
purpose

**33.** The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates is a consistent purpose under clauses 31 (b) and 32 (c) only if the individual might reasonably have expected such a use or disclosure.

#### PERSONAL INFORMATION BANKS

Personal  
information  
bank index

**34.—(1)** A head shall make available for inspection by the public an index of all personal information banks in the custody or under the control of the institution setting forth, in respect of each personal information bank,

- (a) its name and location;
- (b) the legal authority for its establishment;
- (c) the types of personal information maintained in it;
- (d) how the personal information is used on a regular basis;
- (e) to whom the personal information is disclosed on a regular basis;
- (f) the categories of individuals about whom personal information is maintained; and
- (g) the policies and practices applicable to the retention and disposal of the personal information.

Ensure  
accuracy

(2) The head shall ensure that the index is amended as required to ensure its accuracy.

Inconsistent  
use or  
disclosure

**35.—(1)** A head shall attach or link to personal information in a personal information bank,

- (a) a record of any use of that personal information for a purpose other than a purpose described in clause 34 (1) (d); and
- (b) a record of any disclosure of that personal information to a person other than a person described in clause 34 (1) (e).

Idem

(2) A record of use or disclosure under subsection (1) forms part of the personal information to which it is attached or linked.



RIGHT OF INDIVIDUALS TO WHOM PERSONAL INFORMATION  
RELATES TO ACCESS AND CORRECTION

Right of  
access to  
personal  
information

**36.—(1)** Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Right of  
correction

**(2)** Every individual who is given access under subsection (1) to personal information is entitled to,

- (a) request correction of the personal information if the individual believes there is an error or omission;
- (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and
- (c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement.

Request

**37.—(1)** An individual seeking access to personal information about the individual shall make a request for access in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

Access  
procedures

**(2)** Subsections 4 (2) and 17 (2) and sections 18, 19, 20, 21, 22 and 23 apply with necessary modifications to a request made under subsection (1).

Compre-  
hensible  
form

**(3)** If access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general conditions under which the personal information is stored and used.

Exemptions

**38.** A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;
- (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;
- (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
- (d) that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual; or
- (e) that is a research or statistical record.

PART III

APPEAL

Right to  
appeal

**39.—(1)** A person may appeal any decision of a head under this Act to the Commissioner if,

- (a) the person has made a request for access to a record under subsection 17 (1);
- (b) the person has made a request for access to personal information under subsection 37 (1);
- (c) the person has made a request for correction of personal information under subsection 36 (2); or
- (d) the person is given notice of a request under subsection 21 (1).

Time for application (2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

Notice of application for appeal (3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.

Mediator to try to effect settlement 40. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

Inquiry 41.—(1) If a settlement is not effected under section 40, the Commissioner shall conduct an inquiry to review the head's decision.

R.S.O. 1980, c. 484 not to apply (2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1).

Inquiry in private (3) The inquiry may be conducted in private.

Powers of Commissioner (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts I and II of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

Record not retained by Commissioner (5) The Commissioner shall not retain any information obtained from a record under subsection (4).

Examination on site (6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site.

Notice of entry (7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose.

Examination under oath (8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry and, for that purpose, the Commissioner may administer an oath.

Evidence privileged (9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

Protection (10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

Idem (11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

R.S.C. 1985, c. C-5

Prosecution (12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section.

Representations (13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Right to counsel (14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent.

Burden of proof 42. If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

Order 43.—(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Idem (2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

Conditions (3) The Commissioner's order may contain any conditions the Commissioner considers appropriate.

Notice of order (4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 39 (3) written notice of order.

Delegation 44. The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 8 to be produced and examined.

#### PART IV

##### GENERAL

Costs 45.—(1) If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
- (d) shipping costs.

Exception, personal information (2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

Estimate of costs (3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25.

Waiver of payment (4) A head shall waive the payment of all or any part of an amount required to be paid under this Act if, in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed in the regulations.

Review (5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

Disposition of payments (6) The costs provided in this section shall be paid and distributed in the manner prescribed by the regulations.

Powers and duties of Commissioner

46. The Commissioner may,

- (a) offer comment on the privacy protection implications of proposed programs of institutions;
- (b) after hearing the head, order an institution to,
  - (i) cease a collection practice that contravenes this Act, and
  - (ii) destroy collections of personal information that contravene this Act;
- (c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;
- (d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
- (e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and
- (f) receive representations from the public concerning the operation of this Act.

## Regulations

**47.** The Lieutenant Governor in Council may make regulations,

- (a) respecting the procedures for access to original records under section 23;
- (b) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of "record" for the purposes of this Act;
- (c) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions;
- (d) setting standards for the accuracy and completeness of personal information that is under the control of an institution;
- (e) prescribing time periods for the purposes of subsection 30 (1);
- (f) prescribing the payment and allocation of fees received under section 45;
- (g) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 45;
- (h) designating any agency, board, commission, corporation or other body as an institution;
- (i) prescribing circumstances under which the notice under subsection 29 (2) is not required;
- (j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;
- (k) prescribing forms and providing for their use;

- (l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act.

## Offences

**48.—**(1) No person shall,

- (a) wilfully disclose personal information in contravention of this Act;
- (b) wilfully maintain a personal information bank that contravenes this Act;
- (c) make a request under this Act for access to or correction of personal information under false pretences;
- (d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;
- (e) wilfully make a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or
- (f) wilfully fail to comply with an order of the Commissioner.

## Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding \$5,000.

## Consent of Attorney General

(3) A prosecution shall not be commenced under clause (1) (d), (e) or (f) without the consent of the Attorney General.

## Delegation of head's powers

**49.—**(1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

## Protection from civil proceeding

(2) No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice.

Vicarious  
liability of  
institutions  
preserved

(3) Subsection (2) does not relieve an institution from liability in respect of a tort committed by a head or a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted.

Oral requests

**50.**—(1) If a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

Pre-existing  
access  
preserved

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by statute, custom or practice immediately before this Act comes into force.

Information  
otherwise  
available

**51.**—(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

Powers of  
courts and  
tribunals

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

Application  
of Act

**52.**—(1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

Non-  
application of  
Act

(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution.

Other Acts

**53.**—(1) This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

Idem

(2) The following confidentiality provisions prevail over this Act:

R.S.O. 1980,  
c. 308

1. Section 90 of the *Municipal Elections Act*.

R.S.O. 1980,  
c. 31

2. Subsection 57 (1) of the *Assessment Act*.

Exercise of  
rights of  
deceased,  
etc., persons

**54.** Any right or power conferred on an individual by this Act may be exercised,

- (a) if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;
- (b) if a committee has been appointed for the individual or if the Public Trustee has become the individual's committee, by the committee; and
- (c) if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

Review of  
this Act

**55.** The Standing Committee on the Legislative Assembly shall, before the 1st day of January, 1994, undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act.

Commence-  
ment

**56.** This Act comes into force on the 1st day of January, 1991.

Short title

**57.** The short title of this Act is the *Municipal Freedom of Information and Protection of Privacy Act, 1989*.

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